TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 84.

THE PHŒNIX INSURANCE COMPANY

vs.

ISIDOR PECHNER.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED JULY 2, 1875.

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1 STATE OF NEW YORK:

COURT OF APPEALS, *Clerk's Office.*

I, Edwin O. Perrin, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copys of record and proceedings composing the writ of error and return to the Supreme Court of the United States in the case of Isidore Pechner, respondent, vs. Phœnix Insurance Company, appellant, with the originals on file in this office, and that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 17th day of June, A. D. 1875.

[SEAL.] E. O. PERRINE, *Clerk.*

2 To the honorable Sanford E. Church, chief judge of t he court of appeals of the State of New York.

The petition of the Phœnix Insurance Company, a corporation organized under & by virtue of the laws of the State of Connecticut, & having its principal place of business in the city of Hartford, in said State, respectfully shows:

That on the 13th day of May, 1875, in a certain action pending in the court of appeals of the State of New York, in which one Isidor Pechner was plaintiff & your petitioner was defendant, wherein was drawn in question the construction of a clause of a statute of the United States, namely, the 12th section of the act of Congress, approved September 24th, 1789, & known as the judiciary act, a final judgment was rendered in favor of the plaintiff aforesaid & against your petitioner, the decision of which was against the right and privilege claimed by
3 your petitioner under such clause of such statute aforesaid.

Wherefore your petitioner prays your honor to allow a writ of error to the said court of appeals of the State of New York, being the highest court of law or equity in said State in which a decision of the said action could be had for the correction of the error aforesaid & the reversal of the said judgment according to the form of the statute in such case made & provided.

Dated May 15, 1875.

THE PHŒNIX INSURANCE COMPANY OF HARTFORD,
By W. F. COGSWELL,
Its Attorney.

The writ of error is allowed as prayed, to issue with citation, the petitioner filing bond with surety in the penalty of five thousand dollars.

S. E. CHURCH,
Ch. J. Court of Appeals.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, between Isidor Pechner, plaintiff, & the Phœnix Insurance Company, defendant, wherein was drawn in question the construction of a clause of a statute of the United States, namely, the 12th section of the act of Congress approved September 24, 1789, known as the judiciary act, & the decision was against the right & privilege

claimed by the defendant under such clause of such statute, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears:

5 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of Utica, the 17th day of May, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

CHARLES MASON,
Of the Circuit Court of the United States,
Northern District of New York.

Allowed by—

S. E. CHURCH,
Ch. J. Court of Appeals.

(Indorsed:) Isidor Pechner vs. The Phœnix Insurance Company. Writ of error.

6 The United States of America to Isidor Pechner, greeting:

You are hereby cited & admonished to be & appear at the Supreme Court of the United States to be holden at Washington on the second Tuesday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein the Phœnix Insurance Company, of Hartford, Connecticut, is plaintiff in error, & you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, & why speedy justice should not be done to the parties in that behalf.

Witness the honorable Sanford E. Church, chief judge of the court of appeals of the State of New York, the 18th day of May, 1875.

S. E. CHURCH,
Ch. J. Court of Appeals.

7 Personal service of the within citation is admitted.
May 21st, 1875.

S. B. TOMLINSON,
Pl'ff's Att'y.

(Indorsed:) Isidor Pechner vs. The Phœnix Ins. Co. Citation.

8 Know all men by these presents that we, Levi A. Ward and Freeman Clarke, of the city of Rochester, county of Monroe, and State of New York, are held and firmly bound unto Isadore Pechner, of Elmira, New York, in the sum of five thousand dollars, to be paid unto the said Isadore Pechner, or his certain attorney, executors, administra-

tors, or assigns; for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents, sealed with our seals, and dated this 18th day of May, 1875.

Whereas the Phœnix Insurance Company, of Hartford, Connecticut, is about to prosecute a writ of error from the Supreme Court of the United States, to reverse the judgment rendered by the court of appeals of the State of New York, in a certain action wherein the said Isadore Pechner was plaintiff, and the said The Phœnix Insurance Company was defendant:

9 Now, therefore, the condition of this obligation is such that if the said The Phœnix Insurance Company shall prosecute its writ to effect, and answer all damages and costs, if it fail to make its plea good, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

L. A. WARD. [L. S.]
FREEMAN CLARKE. [L. S.]

STATE OF NEW YORK,
City of Rochester, ss:

On this 18th day of May, 1875, before me personally appeared Levi A. Ward and Freeman Clarke, to me known to be the same persons described in and who executed the above instrument, and severally acknowledged that they executed the same.

[L. S.]
W'M W. WEBB,
Notary Public Monroe County.

STATE OF NEW YORK,
City of Rochester, ss:

Levi A. Ward and Freeman Clarke, being duly severally sworn,
10 says he is a resident and freeholder of the county of Monroe and State of New York; that he is worth, in property not exempt from levy and sale on execution, the sum of ten thousand dollars, over and above all debts and liabilities which he owes or has incurred.

L. A. WARD.
F. CLARKE.

Sworn to before me May 18th, 1875.
[L. S.]
W'M W. WEBB,
Notary Public, Monroe Co., N. Y.

State of New York, Monroe County clerk's office, Rochester, N. Y.

I, John H. Wilson, clerk of the county of Monroe, of the county court of said county, and of the supreme court, both being courts of record, having a common seal, do certify that W'm W. Webb, esq., was at the date of the certificate of proof or acknowledgment of the annexed instrument in writing a notary public in and for said county, duly authorized to take the same; that I am well acquainted with his handwriting, and verily believe that the signature to said certificate is genuine, and that the annexed instrument is executed and acknowledged according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and courts, this 18 day of May, A. D. 1875.

[L. S.] JOHN H. WILSON, *Clerk.*

I do hereby approve the within bond, both as to the form thereof and the sufficiency of the sureties.

Dated May 18, 1875.

A. E. CHURCH,
Ch. J. Court of Appeals.

11 Supreme court.

ISIDOR PECHNER
against
THE PHŒNIX INSURANCE COMPANY.

Return of the clerk of Chemung County to the court of appeals in the above-entitled action.

JOHN G. COPLEY, *Clerk.*

12 Supreme court.

ISIDOR PECHNER
against
THE PHŒNIX INSURANCE COMPANY.

Gentlemen: Take notice that the above-named defendant appeals to the court of appeals from the judgment of the supreme court herein, entered in the clerk's office of the county of Chemung on the 23d day of September, 1872.

Dated October 25th, 1872.

Yours, &c.,

W. F. COGSWELL,
Attorney for the Def't & Appl't.

To the clerk of the county of Chemung, and to S. B. Tomlinson, esq., attorney for the pl'ff & resp'd't.

(Endorsed:) Filed October 26th, 1872.

CHEMUNG COUNTY, *Clerk's Office, ss:*

13 I hereby certify that I have compared the foregoing copy of notice of appeal to the court of appeals with the original thereof, filed and now remaining on file in this office, and that the same is a true and correct transcript therefrom, and of the whole of such original.

Witness my hand and the seal of said county, at Elmira, this 28th day of October, A. D. 1872.

[SEAL.]

JOHN G. COPLEY,
Clerk Chemung County.

14 Supreme court.

Summons for money.—Complaint served.

COUNTY OF CHEMUNG:

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

To the above-named defendants:

You are hereby summoned to answer the complaint of Isidor Pechner, plaintiff, a copy of which is herewith served upon you, and to serve

a copy of your answer on the subscribers at the city of Elmira, N. Y., within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for two thousand dollars and cents, with interest thereon from the 15th day of March, 1867, besides costs.

TOMLINSON & RANSOM,
Plaintiff's Attorneys.

Supreme court.

CHEMUNG COUNTY:

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

The above-named plaintiff, for an amended complaint against the above-named defendants, avers, upon information and belief, that said defendants were, on the 31st day of March, 1864, and ever since have been, and still are, a corporation and insurance company, duly
15 organized and created under and by the name aforesaid, and pursuant to the laws of the State of Connecticut, and have an office, and were and are doing business as such at the city of Elmira, in the State of New York, having fully complied with the laws of this State to enable them to do business therein as such insurance company, and to issue the policy hereinafter mentioned.

And said plaintiff further avers, upon information and belief, that on the 31st day of March, 1864, at the city of Elmira aforesaid, in consideration of the payment of the premium of $15 by one D. Straus & Co. to said defendants, they, by their agents duly authorized thereto, made their certain policy of insurance in writing, a copy of which is hereto annexed, marked "A," to which said plaintiff refers as a part of this complaint, and delivered the same to said Straus & Co., in and whereby said defendants insured them against loss or damage by fire to the amount of $2,000, upon the stock, goods, wares, merchandise, and personal property mentioned and described in the aforesaid copy annexed policy, for the term of one year thereafter.

And said plaintiff further avers, upon information and belief, that afterwards, and on the 31st day of March, 1865, at the city of Elmira aforesaid, the said defendants, by their agents duly authorized thereto, in consideration of $15 to them paid by said Straus & Co., executed and delivered to them their certificate of renewal of said policy, a copy of which is hereto annexed, marked "B," to which reference is likewise made as a part of this complaint, and thereby renewed said insurance for the further term of one year from said 31st day of March, 1865, upon the property aforesaid.

And said plaintiff further avers, upon information and belief, that said Straus & Co., at the time of the issuing of said policy and the renewal thereof as aforesaid, had an interest in said insured property as the owners thereof, and so continued to have such interest to an amount exceeding the sum of $8,000 until on or about the 26th day of December, 1865, at which time the said Straus & Co., for a valuable consideration to them paid by said plaintiff, sold, assigned,
16 and transferred to said plaintiff the property insured as aforesaid, together with the policy of insurance thereon as aforesaid, by and with the consent in writing of said defendants endorsed thereon by their agents duly authorized for that purpose.

And said plaintiff further avers, that on the 31st day of March, 1866, at the city of Elmira aforesaid, the said defendants, by their agents duly authorized thereto, in consideration of $15 to them paid by said plaintiff, executed and delivered to him their certificate of renewal of said policy, a copy of which is hereto annexed, marked "C," which is hereby referred to as a part of this complaint, and thereby renewed said insurance for the further term of one year from said 31st day of March, 1866.

And said plaintiff further avers, that at the time of the assignment of said policy and the issuing of the certificate of renewal thereof to him as aforesaid, and from then until the fire hereinafter stated, this plaintiff had an interest in the property insured as aforesaid, as the owner thereof, to an amount exceeding the sum of $8,000.

That on the 15th day of January, 1867, said insured property was totally destroyed by fire, which did not happen by or from any of the causes excepted and mentioned in said policy.

And said plaintiff further avers, that this plaintiff, before, up to, and including the time of said fire, duly performed all the conditions of said policy of insurance on his part, and said plaintiff, more than sixty days before the commencement of this action, gave and delivered to said defendants, by their agents duly authorized for that purpose, due notice and proof of the fire and loss aforesaid, as required by said policy, and duly demanded payment of the said sum of $2,000 from the said defendants, but the same has not been paid, nor any part thereof, and said defendants are now justly indebted to this plaintiff therefor in said sum of $2,000, with interest thereon from the 15th day of March, 1867.

17 Wherefore said plaintiff demands judgment against said defendants for the sum of $2,000, with interest thereon from March 15th, 1867, besides costs.

TOMLINSON & RANSOM,
Plaintiff's Attorneys.

CHEMUNG COUNTY, *ss:*

Isidor Pechner, of said county, being duly sworn, says he is the plaintiff in the above-entitled action, and has heard read the foregoing complaint; that the same is true to the knowledge of deponent, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

I. PECHNER.

Sworn to before me this 5th day of June, 1869.

R. H. RANSOM,
Justice of the Peace.

A.

No. 1517. $2,000.

Phœnix Insurance Co. of Hartford, Connecticut.

By this policy of insurance, the Phœnix Insurance Company, in consideration of the sum of fifteen dollars to them in hand paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure D. Strauss & Co. against loss or damage by fire to the amount of $2,000, on their ready-made clothing, cloths, tailors' trimmings, and such other articles as are usually kept for sale in clothing-stores, contained in three-story brick building, with metal roof, situate in a row of similar buildings, and known as No. 157, on the south side of Water street, in Elmira, N. Y. Other insurance, $2,000.

Consent is hereby given to remove property insured under policy No. 1517, in brick store, with metal roof, situate on the south side of and known as No. 127 Water street, in *in* Elmira, N. Y.

$2,000 One year, 75 p. c't. $15 00.

18 And said company hereby agree to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified from the thirty-first day of March, one thousand eight hundred and sixty-four, at noon, to the thirty-first day of March, one thousand eight hundred and sixty-five, at noon; the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same, made by the assured and received at this office, in accordance with the terms of the policy hereinafter mentioned.

1. But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and provided further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after receipt of proofs herein required; and in case this company elect to rebuild, the assured shall, if required, furnish plan and specifications of the building destroyed.

2. This company shall not be liable for loss by theft at or after a fire; nor for any loss or damage by fire caused by means of, or during an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for the loss of bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind, money, bullion, jewels, plate, watches, musical or scientific instruments, ornaments, medals, patterns, printed music, engravings, paintings, picture-frames, sculptures, casts, models, or curiosities, unless particularly specified in the policy; nor from
19 fires in buildings unprovided with good and substantial stone or brick chimneys; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for loss or damage caused by the falling of any building, or from any fire ensuing therefrom; nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance; nor by lightning, or the explosion of a steam-boiler, unless fire ensues, and then for the loss or damage by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning; nor for loss or damage caused by removal of property from a building, except it be proved that such removal was necessary to preserve the property, in which case the damage shall be borne by the assured and the company in the proportion that the whole sum insured bears to the whole value of the property insured.

3. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent

of the company written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever within the control of the assured without the assent of this company indorsed hereon; or if the property be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance; or if this policy shall be assigned either before
20 or after a loss without the consent of the company indorsed hereon; or if the premium shall be unpaid; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if the assured shall keep gunpowder, or phosphorus, or keep and use camphene, spirit-gas, or chemical oils, without written permission in this policy, then, and in every such case, this policy shall be void.

4. And if in the opinion of the company an overinsurance exists, or shall be hereafter made on the property hereby insured, or the risks be increased by any means, or if for any other cause the company shall so elect, the company reserve to themselves the right of canceling this policy by paying to the assured the unexpired premium pro rata.

5. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representation; but in case there shall have been any change in the risk, either within itself or by adjacent buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void.

6. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void.

7. In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether such other insurance be by specific or by
21 general or floating policies. Re-insurance for any other insurance company, to be on the basis of joint liability with said company, and in the event of loss, this company to pay its proportion of said loss sustained by said company under their policy.

8. In case of loss, the assured should use their best endeavors in saving and protecting the property from damage at and after the fire; if they shall fail so to do, this company will not be liable for damage caused by such failure; and there can be no abandonment to the company of the property insured. The assured shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured or containing the property insured, and the several parts thereof, were used, when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to

the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify. And the assured shall, if required, submit to an examination, under oath, by any person appointed by the company, and if deemed necessary by the company, to a second examination, and subscribe to such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the
22 same for examination to any person named by the company.

Damage to property not totally destroyed shall be appraised by disinterested men, mutually chosen by the assured and the company, and the company reserves the right to take the articles damaged at their appraised value. When personal property is damaged, the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; and the detailed report of the appraisers, in writing, shall form a part of the proofs hereby required, one-half the appraisers' fees to be paid by the company. In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein, certified to by them. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. And until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing, on the part of the assured, shall cause a forfeiture of all claim under this policy.

9. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statue of limitation to the contrary notwithstanding.

23 10. Camphene, spirit-gas, burning-fluid, phosgene, or any other inflammable fluid, when used for a light, subjects the insured to an additional charge, and permission for such use must be indorsed in writing on the policy; otherwise this insurance shall be void.

Gunpowder, saltpetre, phosphorus, petroleum, nap'tha, benzine, benzole, or benzine varnish, are positively prohibited from being deposited, stored, or kept in any building insured, or containing any property insured by this policy, unless by special consent in writing indorsed on this policy, naming each article specifically; otherwise this insurance shall be void.

Plate-glass in doors or windows, when the plates are of the dimensions of three feet square or more, also fences and privies, store furni-

ture and fixtures, must be separately and specifically insured; otherwise they are not protected by this policy.

In witness whereof the said Phœnix Insurance Company have caused these presents to be signed by their president, and attested by their secretary, in the city of Hartford and State of Connecticut, and this policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the duly-authorized agent of said Phœnix Insurance Company at Elmira, N. Y.

H. KELLOGG, *President.*

W'M B. CLARK, *Secretary.*

Countersigned at Elmira this 31st day of March, A. D. 1864.

PERRY & SCOTT, *Agents.*

B.

Phœnix Insurance Co. of Hartford, C't, agency at Elmira, N. Y.

No. 1687.

Received of D. Strauss & Co. fifteen dollars, being the premium on two thousand dollars insured under policy No. 1517, which is
24 hereby continued in force for one year, to wit: From the 31st day of March, 1865, until the 31st day of March, 1866, at noon.

[Internal-revenue stamp, 25 cents, cancelled.]

H. KELLOGG, *President.*

W'M B. CLARK, *Secretary.*

Countersigned at Elmira, N. Y., 31st day of March, 1865.

PERRY & SCOTT, *Agents.*

"C."

No. 1853.

Phœnix Insurance Co. of Hartford, C't.

Agency at Elmira, N. Y.

Received of I. Pechner fifteen dollars, being the premium on two thousand dollars insured under policy No. 1517, which is hereby continued in force for one year, to wit: from the 31st day of March, 1866, until the 31st day of March, 1867, at noon.

[Internal-revenue stamp 25 cents, cancelled.]

H. KELLOGG, *President.*

W'M B. CLARK, *Secretary.*

Countersigned at Elmira, N. Y., 31st day of March, 1866.

THO'S PERRY, *Agent.*

The original complaint in this action was sworn to by the plaintiff May 21st, 1867, and served on the defendant June 1st, 1867. It contains the words and figures contained in the amended complaint, from folios to , and the copy of defendant's policy.

Supreme court.

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

First. The defendant in the above-entitled action, for answer to the amended complaint therein, admits that it is a corporation, created and doing business as alleged in said complaint, and that said defend-
25 ant issued and renewed the policy of insurance mentioned in the complaint as alleged therein; that D. Straus & Company assigned the aforesaid policy and the property thereby insured to the above-named plaintiff, and the defendant consented thereto, as alleged in said complaint, and that the property insured by said policy of insurance was destroyed by fire on or about the 15th day of January, 1867,

And said defendant, further answering said complaint, denies each and every allegation therein contained not hereinbefore specifically admitted.

Second. And said defendant, for a further and separate answer to the said complaint, says that in the policy of insurance set forth in said complaint, and upon which this action is brought, there was contained a provision which provided, among other things, that if the assured should have or should thereafter make any other insurance on the property thereby insured, or any part thereof, without the consent of the defendant written thereon, then the said policy should be void.

And the defendant further says that, notwithstanding the said provision, and in violation thereof, the said assured, after the issuing of the said policy, procured other insurance upon the property thereby insured, to wit, a policy, issued on or about the 17th day of August, 1866, by the Insurance Company of North America, for two thousand dollars; a policy, issued on or about the 25th day of August, 1866, by the National Insurance Company of Boston, for two thousand dollars; and a policy, issued on or about the 29th day of August, 1866, by the Arctic Insurance Company of New York, for fifteen hundred dollars, without notice thereof being given to the defendant, and without the consent of the defendant written upon the said policy, or otherwise to either or any of such insurance, except that the said defendant by endorsement upon said policy consented to other insurance upon said property to the amount of two thousand dollars, and no more.

W. F. COGSWELL.
Def't's Att'y.

26 STATE OF CONNECTICUT,
City and County of Hartford, ss:

Henry Kellogg, being duly sworn, says he is the president of the defendant in the above-entitled action; that said defendant is a corporation, created under and by virtue of the laws of the State of Connecticut.

Deponent further says that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters stated upon information and belief, and as to those matters he believes it to be true.

HENRY KELLOGG,
President.

Subscribed and sworn to before me this 21st day of June, 1869, at the city of Hartford aforesaid.

In witness whereof I have hereunto set my hand and affixed my official seal.

[SEAL.] EDWARD GOODMAN,
A Commissioner for the State of New York, in Hartford, Conn.

[5-cent stamp.]

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I hereby certify that Edward Goodman, of Hartford, county of Hartford, and State of Connecticut, was at the time of taking the annexed affidavit a commissioner for the State of New York, to take the proof and acknowledgment of deeds and other instruments to be used and recorded in this State, and to administer oaths and affirmations, pursuant to chapter 270, laws of 1850, as amended by chapter 788, laws of 1857, and chapter 222, laws of 1859; and that such commissioner was at the time aforesaid duly authorized to take the same, and that I have compared the signature of the said commissioner to the certificate subjoined to the annexed instrument with the signature of such commissioner deposited in this office, and have also compared the impression of the seal affixed to such certificate with the impression of the
27 seal of such commissioner deposited in this office, and I verily believe the signature and impression of the seal to the said certificate to be genuine.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this twenty-second day of June, one thousand eight hundred and sixty-nine.

[SEAL.] D. WILLERS, J'R,
Dep. Secretary of State.

Supreme court.

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

The above action came on to be tried at a circuit of this court, held at Elmira, in and for the county of Chemung, on the 2d day of February, 1872, before the Hon. Ransom Balcom. Upon such case being called, the counsel for the defendant presented to the court the petition and bond, which were presented to the court after the commencement of this action, and requested the court to proceed no further in the case.

The orders of the special and general term made thereon were also presented, and are as follows:

Supreme court.

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

Take notice that at the next special term of this court, to be held at the court-house in the village of Norwich, in the county of Chenango, on the 15th day of July, 1867, the appearance of the defendant in the above-entitled action will be entered, and a petition, a copy of which and of the affidavit verifying the same are herewith served on you,

28 will then and there be filed in said court; and a bond, a copy of which is herewith served on you, will also then and there be presented to said court for approval, and at the same time a motion will be made to said court, founded upon said petition, the affidavit verifying the same, said bond and the entry of defendant's appearance, for an order that the said bond and security be accepted, that the action be removed for trial to the circuit court of the United States for the northern district of New York, or for such other further or different order as the court may see fit to grant.

Dated June 15th, 1867.

W. F. COGSWELL,
Attorney for Defendant for Said Motion Only.

To TOMLINSON & RANSON,
Plaintiff's Attorneys.

Supreme court.

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

On reading foregoing notice of motion, annexed petition, affidavit verifying same, and annexed bond, it is ordered that the defendant have twenty days' additional time in which to appear and answer in this action.

Dated June 19th, 1867.

JNO. C. CHUMASERO,
Monroe Co. Judge.

To the supreme court of the State of New York.

The petition of the Phœnix Insurance Company respectfully shows that an action has been commenced against your petitioner, in the supreme court of the State of New York, by the service of a summons and complaint upon your petitioner on or about the first day of June, instant, in which action one Isidor Pechner is the plaintiff and your peti-
29 tioner is the defendant; that the amount in controversy in said action exceeds five hundred dollars, exclusive of costs, the said action being brought to recover of your petitioner, defendant therein, two thousand dollars and interest, upon an insurance policy issued by your petitioner to D. Straus & Co., and by said D. Straus & Co. assigned to said Isidor Pechner, plaintiff in said action, and the several renewals of said insurance policy, insuring property to the amount of two thousand dollars, which property said Pechner alleges has been destroyed by fire, as appears by the complaint in said action, and which policy of insurance, and the renewals thereof, your petitioner avers are cancelled and made void by the unauthorized acts of the said Pechner; and your petitioner avers that it is not liable in any sum upon said policy and renewals.

And your petitioner further shows, that it has not yet entered its appearance in said action, and said action is still pending, undetermined, by default of your petitioner or otherwise. And your petitioner further shows that your petitioner is a fire-insurance corporation, created under and by virtue of the laws of the State of Connecticut, located, doing business, and having its principal office and place of business at the city of Hartford, in the State of Connecticut, and that your petitioner

is a citizen of the State of Connecticut, and is not a citizen of the State of New York, and that, as your petitioner is informed and believes, Isidor Pechner, the plaintiff in said action, is a citizen of the State of New York, and that the place for the trial of said action, as stated in said summons and complaint, is the county of Chemung, in the northern district of New York.

Wherefore your petitioner prays that the said action be removed for trial from the said supreme court of the State of New York into the next circuit court of the United States to be held in the northern district of New York.

Dated Hartford, Conn., June 11th, 1867.

[L. S.] THE PHŒNIX INSURANCE CO.,
By WM B. CLARK, *Sec'y.*

30 STATE OF CONNECTICUT,
County & City of Hartford, ss:

William B. Clark, being duly sworn, deposes and says that he resides in the city of Hartford, aforesaid, and is the secretary of the Phœnix Insurance Company, the petitioner in the foregoing petition; that said petitioner is a fire-insurance corporation, created under and by virtue of the laws of the State of Connecticut, located, doing business, and having its principal office at Hartford, in the State of Connecticut; that he has heard read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true.

Deponent further says that he has fully and fairly stated the case in this action to William F. Cogswell, the defendant's counsel in this action, who resides in the city of Rochester, in the county of Monroe and State of New York, and that the defendant has good and substantial defense, in said action upon the merits, as he is advised by said counsel, after having stated the case therein to him as aforesaid, and verily believes.

WM B. CLARK.

STATE OF CONNECTICUT,
County of Hartford, ss:

Be it remembered that on this the 12th day of June, one thousand eight hundred and sixty-seven, before me, Edward Goodman, a commissioner appointed by the governor and under the laws of the State of New York, and residing in Hartford, in the State of Connecticut, personally appeared William B. Clark, signer of the foregoing deposition, and made oath to the truth of the facts and allegations therein stated.

In witness whereof I have hereunto set my hand and attached my official seal, at my office in Hartford, Connecticut.

[L. S.] EDWARD GOODMAN,
Commissioner for the State of New York.

31 STATE OF NEW YORK,
Office of the Secretary of State:

I hereby certify that Edward Goodman, of Hartford and State of Connecticut, was, at the time of taking the annexed affidavit, a commissioner for the State of New York, to take the proof and acknowledgment of deeds and other instruments to be used or recorded in this State, and to administer oaths and affirmations, pursuant to chapter 270, laws of

1850; and that such commissioner was at the time aforesaid duly authorized to take the same; and that I have compared the signature of the said commissioner to the certificate subjoined to the annexed instrument with the signature of such commissioner deposited in this office, and have also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner, deposited in this office, and I verily believe the signature and impression of the seal to the said certificate to be genuine.

Witness the hand and the seal of office of the secretary of state, at the city of Albany, this 13th day of June, 1867.

[L. S.] ERASTUS CLARK,
Dep'y Secretary of State.

Know all men by these presents that I, William F. Cogswell, of the city of Rochester, county of Monroe and State of New York, am held and firmly bound unto Isidor Pechner, of the city of Elmira, county of Chemung and State of New York, in the sum of two thousand dollars, lawful money of the United States, to paid to the said Isidor Pechner, his executors, administrators or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with my seal, and dated this fifteenth day of June, in the year one thousand eight hundred and sixty-seven.

Whereas the said Isidor Pechner has lately commenced an
32 action in the supreme court of the State of New York against the Phœnix Insurance Company, by the service of a summons and complaint, and the said The Phœnix Insurance Company has petitioned or is about to petition the supreme court for the removal of said action for trial from said supreme court to the next circuit court of the United States to be held in the northern district of New York, pursuant to the act of Congress in such case made and provided, for the reason that the plaintiff therein is a citizen of the State of New York and the said defendant is a citizen of the State of Connecticut, and is not a citizen of the State of New York, and the amount in controversy in said action exceeds the sum of five hundred dollars, exclusive of costs.

Now the condition of this obligation is such, that if the said action be removed for trial from said supreme court to the next circuit court of the United States for the northern district of New York, the said The Phœnix Insurance Company, the defendant therein, shall enter in said circuit court, on the first day of the next session thereof, copies of said process and of any and all process or processes against said defendant in said action, and shall also then and there appear according to the provisions of the said act of Congress; and in default thereof this obligation shall be and remain in full force and virtue.

[L. S.] W. F. COGSWELL.

STATE OF NEW YORK,
Monroe County, ss :

On this 15th day of June, in the year one thousand eight hundred and sixty-seven, before me came William F. Cogswell, to me personally known to be the same person described in and who executed the foregoing obligation, and acknowledged that he executed the same.

GEO. T. PARKER,
Commissioner of Deeds.

33 STATE OF NEW YORK,
Monroe County, ss :

William F. Cogswell, being duly sworn, says he is a resident and freeholder of the said county of Monroe; that he is worth in property not exempt from execution the sum of four thousand dollars over and above all debts and liabilities which he owes or has incurred.

W. F. COGSWELL.

Sworn to before me, June 15th, 1867.

GEO. T. PARKER,
Com. of Deeds.

(Endorsed :) I approve of the within bond and sufficiency of the surety therein.

D. BORDMAN,
Justice Supreme Court.

JULY 3, 1867.
Filed July 10, 1864.

At a special term of the supreme court, held at the village of Ithica, on the 8th day of July, 1871.
Present, Hon. D. Boardman, justice.

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

On reading and filing petition, affidavit, bond, and notice of motion, which bond is approved and accepted as to its sufficiency in matter of form and of the surety, and on offering to enter the appearance of the defendant, after hearing M'r Cogswell for the defendant and M'r Tomlinson for the plaintiff, ordered that the motion that this action be removed for trial from this court to the circuit court of the United States for the northern district of New York be, and the same is hereby, denied, with ten dollars costs of opposing.

At a general term of the supreme court of the State of New York, held in and for the sixth judicial district, at the court-house in
34 the city of Binghamton, in the county of Broome, on the third Tuesday of November, 1867.
Present, Hon. Charles Mason, presiding justice.
" Ransom Balcom,
Douglass Boardman, } justices.

ISIDOR PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

Orders appealed from affirmed, with $10 costs of each order.

C. M. ROOT, *Clerk.*

(Copy.)
(Endorsed :) Filed Nov. 30, 1867.

CHEMUNG COUNTY,
Clerk's Office, ss :

I hereby certify that I have compared the foregoing copy, notice of motion, petition, affidavit, bond, order of the Monroe County judge, and

order affirming orders appealed from, with the originals thereof remaining on file in this office, and the same are true and correct copies thereof, and of the whole of said originals.

Witness my hand and the seal of said county of Elmira, this 18th day of January, 1869.

[L. S.] R. A. STEWART,
Clerk Chemung Co.

It was here conceded by defendant's counsel that no appeal has ever been made by the defendant from the said order of the general term, and the same remains in all respects unreversed.

That since the presentation of said petition and bond as aforesaid, no copies of any process against said defendant in this action has ever been filed or entered by the defendant in the circuit court of the United States for the northern district of New York, or any appearance
35 of the defendant made or entered therein, or any proceedings whatever had in said court in this action.

The plaintiff's counsel thereupon claimed and insisted that the evidence before the court was insufficient to deprive this court of jurisdiction in this action, and that the papers upon which a removal of the cause from this court was claimed are insufficient for that purpose, and that this cause still remained in this court.

The court denied such application, upon the grounds that the papers were defective when presented and are defective still, and the cause still remains in this court, and the decision of the general term remains in full force, and had not yet been reversed, and the court was bound by it; to which ruling and decision the counsel for the defendant excepted.

A jury was thereupon called, and the plaintiff, to maintain the issues on his part, offered in evidence the policy of insurance issued by the defendant, with the assignment thereof, and consent of the defendant thereto, a copy of which is found at fols. 17 to 48 of the case, and the various renewals thereof continuing the same in force until the 31st day of March, 1867, the last of which is dated March 31, 1866, and continues such policy for the space of one year, and in the words and figures following:

Phœnix Insurance Co. of Hartford, C't, agency at Elmira, N. Y.

No. 1853.

Received of I. Pechner fifteen $\frac{00}{100}$ dollars, being premium on two thousand dollars, insured under policy No. 1517, which is hereby continued in force for one year, to wit, from the 31st day of March, 1866, until the 31st day of March, 1867, at noon.

H. KELLOGG, *President.*

W'M B. CLARK, *Sec'y.*
THO'S PERRY, *Agent.*

Countersigned at Elmira, N. Y., this 31st day of March, 1866.

[25-cent revenue stamp, cancelled.]

36 The plaintiff's counsel thereupon offered in evidence the proofs of loss furnished the defendant, copies of which are hereto annexed and marked "A."

It was admitted that the defendant received timely notice of the loss, and that the proofs of loss were received in due time and as required by the policy.

The plaintiffs then gave evidence tending to show a loss on the stock of goods covered by the defendant's policy, of the amount stated in such proofs of loss, and no evidence to the contrary thereof was offered by the defendant.

HENRY D. STRAUS, being sworn for the plaintiff, testified as follows:

I went and saw M'r Eastman, the general agent of the company, the latter part of May or first of June after the fire, about paying the loss; I went with the plaintiff; saw him at the Hathaway House in Elmira; plaintiff asked him why the company refused to pay, the other companies had settled with him; and Eastman said, "I don't consider the company owes you a cent." Plaintiff said he did not see why, and Eastman showed him the clause in the policy about what their company allowed about other insurance; Eastman said that "According to that, we don't owe you a cent; but we are willing to give you $800 to settle the case and not go to law over it; but if you do go to law about it we will make you sick of it before we get through with you." I told him I always carried not less than $7,000 insurance on the stock; plaintiff said he would not take $800, and had showed Scott all the policies on the stock, and he said they were all right, and inquired how it was; Eastman said he knew nothing of what Scott had done.

The policy in suit was originally issued to me. I sold my stock of goods to the plaintiff. At the time of selling my stock in trade to Pechner, I recollect going with him to see Ayers and Perry & Scott; that was the day of selling, or a day or so after; we both went together and saw Mr. Scott, at Perry & Scott's office in Elmira.

37 (It is admitted that Perry & Scott were local agents of the defendant in Elmira at that time.)

I had my other policies with me that I had taken out and signed over to Pechner, together with that of the Phœnix, all the four policies; I don't recollect in what companies the other three policies were. (Two policies of insurance shown witness.) Those are two of the policies; one is in the Northwestern Insurance Company, for $1,000, and one in the Home of New York, for $3,000; the other policy was for $1,500; don't remember whether it was in the Hartford Insurance Company or not. These three policies, outside the Phœnix policy, were issued by M'r Ayres; Ayres is an insurance agent here; we went in and saw Scott.

Q. Now tell us what took place.

(To this question the counsel for the defendant objected.

The counsel for the plaintiff said they offered to show that the other policies were showed to Perry & Scott, and they allowed they were all right.

To this the counsel for the defendant objected, as being immaterial, and on the ground that the plaintiff could not give parol evidence to vary the terms of the written contract.

The court overruled the objection, and the counsel for the defendant excepted.)

A. I went with Pechner to Ayers first, and he was not at home, and then to Scott's, with the four policies, and told him I had sold out to this man Pechner, and I wanted him to sign over these policies; so he said, all right, and Pechner took the policies, all four policies, and gave them to him, and told him he wished him to see if they were all correct; he wanted to be sure about it, and took his and signed it over, and Scott took the policies and examined them; he opened them and looked at them, and took out his and made the transfer of it; he wrote his con-

sent on the back of it, and Pechner asked him to see whether I charged him too much for the policies; he said he could not read; and Scott looked at them, and M'r Scott told him I charged him some-
38 where about right; he had three of them that had to run quite a while yet. We took the policies and went to Mr. Ayers. When Scott examined the policies and handed them back he said, "There, you are all right; now this is all you want," and we went off. We had not then obtained Ayers' consent to the transfer; Scott said we had to go to Ayers with the other policies and get his consent; I suppose that was what we were after at the time, to get a consent to assignment; we went to Ayers afterwards and got his consent. I got the Phœnix policy renewed after it was issued and before the sale; got a renewal March 31st, 1865; got the renewal of Scott; at that time he wanted to insure me some more yet; he brought the renewal in and I paid him, and he thought I ought to have some more insurance. We didn't talk at that time about any other insurance; I don't remember that there was any talk about any other insurance before the sale; at the time I got the first renewal he wanted me to take other insurance, but I didn't.

On being cross-examined, the witness testified:

Policies shown; these are two of the three other policies I had on the property at the time I sold to Pechner, and which I assigned to him.

The policies were offered in evidence. One of these policies was issued by the Northwestern Insurance Company, and insured the property described in the defendant's policy for the sum of $1,000; the other was issued by the Home Insurance Company of New York, and insured the same property for the amount of $3,000.

We didn't say anything about consenting to $5,500 other insurance when we called on Perry & Scott to get their consent to the assignment of this policy; when I got my renewal in March, 1865, I said nothing about the other insurance I had on my property; it is not usual to say anything about the renewal; I didn't take any additional insurance after I took the policy of Scott; I had this other insurance of $5,500 before. I never asked Perry & Scott to consent to the $5,500 other insurance.

39 Redirect:

I don't know whether Scott knew I had other insurance on my stock or not; he never asked me. I always depended upon insuring with Ayers, and paid no attention to it. He gave me my policies.

Q. Did Scott know from you that you had an insurance with Ayers?

(To this the counsel for the defendant objected. The objection was overruled, and the counsel for the defendant excepted.)

A. Yes, sir; he knew I had insurance with Ayers.

(The defendant's counsel asked that this answer be stricken out. The court denied the motion, and the defendant's counsel excepted.)

Mr. Scott came to the store several times, and wanted me to give him a policy. I told him I always insured with Ayers and was well pleased; he had me in good companies and always attended to it, and he said I must not let one man have everything, and I told him the next time I got a spring stock in I will give you one; there is one runs out. It was in the spring, some time, and he came in and brought me the renewal, the very day it run out. I just dropped the one with Ayers and took the one with Scott on the same stock.

ISIDOR PECHNER, sworn for the plaintiff, testified:

I am the plaintiff in this action. I recollect going to see Scott after I purchased of Strauss, with him the same day I made the purchase.

M'r Strauss took the four policies of insurance with him on the goods I had bought of him. We went up to see Scott in his office.

Q. What took place there?

(To this the counsel for the defendant objected. The court overruled the objection, and the counsel for the defendant excepted.)

A. M'r Strauss said to Scott: "M'r Scott, I have sold out that stock of goods to M'r Pechner. There is the policy on the goods M'r Pechner bought of me. Will you please pick out yours from the policies
40 and sign it over to M'r Pechner?" and so M'r Scott took the policies and opened them, and I asked M'r Scott, "Will you please look them over and see if they are all right? because I can't read English. I can read newspapers, but not writing; so I leave it to you to see if everything is all right;" and Scott looked them over, and signed this policy over to me, and folded them up and gave them back to me, and said, "M'r Pechner, those policies are all right," and we went up to M'r Ayers, and at M'r Ayers' we did the same thing; Scott said we must have the other policies signed over too. I got the Phœnix policy renewed after I purchased this stock; that was done in M'r Scott's office, by M'r Scott. I had with me the other three policies from M'r Ayers, all four together. I always keep them together.

Q. What was done there and said before you got this policy renewed?

(To this the counsel for the defendant objected. The court overruled the objection, and the counsel for the defendant excepted.)

A. I asked Scott to see if the policy run out pretty soon, and he did; he had the old one renewed; he opened all four of the policies to see when they ran out; I said I wanted a renewal; he took the Phœnix policy and said he was going to renew it, and did; I paid him the premium that he charged me; the three other policies which Strauss had on the stock were afterwards given up to M'r Ayers; some of them had pretty near run out, and others not, and Ayers told me to give him the old policies and he would put me in three different new companies; and I surrendered the old policies, and he put me in three other companies; I do not recollect their names; the amount of insurance was the same. In April I removed from one store to another; I saw Scott and got his consent to the removal; I had the four policies together; Scott consented to the removal, and put in the number where I moved to in the policy; wrote a consent to the removal April 2, 1866; Scott put down in
41 each policy the number of the store, and I went to Ayers and had the same thing done.

Q. Did he examine the three other policies?

A. Just the same as always; he had them in his hands.

Q. Did he open them?

(To this question the counsel for the defendant objected. The court overruled the objection, and the counsel for the defendant excepted.)

A. Yes, sir; I went and got M'r Ayers' consent to the removal on the other three policies the same day.

On being cross-examined, the witness testified:

I signed and swore to the proofs of loss put in evidence; I had in force at the time of the fire, on the property covered by the defendant's policy, a policy of insurance in the North American Insurance Company for $2,000; in the Arctic Insurance Company for $1,500; and in the National Insurance Company of Boston for $2,000; I can read English printed letters.

It was conceded that the third of the policies issued to M'r Strauss was in the Hartford Insurance Company; that M'r Ayers, as agent of

the three companies, took and surrendered all the three policies, and issued the policies mentioned in the proofs of loss in their place and stead, and for the same aggregate amount.

The plaintiff here resting, and the defendant moving for a non-suit, the plaintiff recalled Isidor Pechner, who further testified:

I took these three new policies and showed them to Scott; I cannot tell when; it was in the summer; I cannot exactly tell when, whether it was before or after the Phœnix renewal; I know I took them to M'r Scott and asked Scott if these insurances were good and all right; he opened them and looked them over, and said they were all right.

Cross-examined:

I can't recollect whether it was before or after the renewal of the Phœnix policy; it was so long ago it has slipped out of my mind.

42 Redirect:

The renewal of the Phœnix policy was in March, I guess; the three old policies ran out in the summer; I got the other policies from Ayers about the same time these expired; I took these policies to Scott the same day I got them.

The plaintiff here rested his case.

The defendant's counsel moved for a non-suit on the following grounds:

First. That as the evidence stood, the plaintiff could not recover.

Second. That the insured had other insurance on the property insured by defendant's policy, without the consent of the company written thereon.

Third. That it appears that the insured obtained after the issuing of defendant's policy, and had at the time of the fire mentioned in the complaint, other insurance on the property insured by defendant's policy, without the consent of the defendant written thereon.

Fourth. That it appears from the evidence and proofs of loss that the insured had other insurance to the amount of $5,500—$2,000 in the North American Insurance Co. of Philadelphia, $1,500 in the Arctic Insurance Co. of New York, $2,000 in the National Insurance Co. of Boston, without notice thereof having been given to the defendant, and without the consent of the company written on the policy, and without the consent of the company.

The court denied the motion for a non-suit, and the counsel for defendant excepted.

The defendant, to maintain the issues on its part, called

EDWIN A. SCOTT, who, being sworn, testified:

I live in Elmira, and was the agent for the defendant there from 1863 to 1867; I had frequently called on Mr. Strauss, frequently been in his store and looked over his goods, &c., and obtained his permission to write $2,000 insurance after one policy expired; I understood him to say he had $4,000 insurance only; I wrote the policy and gave permission for $2,000 other insurance; that was written in
43 the policy; I recollect Strauss and Pechner coming into my office to get my consent to the assignment of the policy to Pechner; they both came in the office, and they had papers in an envelope and handed me the package, and I took out one policy and gave consent to the assignment. After it was accomplished I handed them the policy back, and I think I told them they had better go to Ayers and get the other fixed; I did not examine the other policies to my recollection; I did not see the contents of the other policies; they gave me no notice

of the amount of the other policies; they did not ask me, nor did the plaintiff ask me, to consent to $5,500 other insurance. This policy was renewed in March, 1866, and I believe taken into the plaintiff; I have no recollection of it; it was renewed and the premium paid; whether paid me or not I do not recollect. At that time I did not see the amount of the other three policies on this property; I did not consent to that amount of insurance; I have never seen the three new policies that the plaintiff got in August, 1866, that I know of; I did not know that he changed his policies; I never knew that Strauss or the plaintiff had $5,500 other insurance on the other property covered by the defendant's policy; I suppose they had $2,000 other insurance and had consented to it; I was never asked to consent to $5,500 other insurance.

Cross-examined:

I have been an agent of the defendant for about nine years, and am their agent now; have been doing a large business for this company in this county, and have issued hundreds of policies and renewals, and have been notified of hundreds of cases where there was other insurance; I have no recollection of the facts Strauss and Pechner testified to; such things as consents to transfers and renewals of policies are of frequent occurrence in my business; there is no record in this case except the mere transfer and renewal; these policies when brought in were said to be policies written by M'r Ayers; I don't recollect the new policies being brought in, won't swear they were not; I will swear
44 I have no recollection of Pechner saying they were new policies; I will swear I have no recollection of seeing them; I have no recollection of Pechner bringing in the other policies when the Phœnix policy was renewed; at the time of the consent to the transfer, they had papers which I presumed were policies; I swear positively that I have no recollection of telling them the policies were all right.

Redirect:

I will swear positively I never knew there was more than $2,000 other insurance on this property; I swear positively I never consented to $5,500 other insurance on this property.

Recross:

If I had read those policies at any time I should have known the amount and the time they expired by reading them over; when a party shows me a policy, the three points which would first attract my attention would be the amount, the property on which the policy was issued, and the time of the expiration; I should not notice the little minutiæ much; I swear I don't recollect these three policies being shown to me at any time, and that I didn't know of any $5,500 additional insurance; if I had read the policies over I should have known.

The evidence here closed.

The above is all the evidence given on the question of notice of and consent to other insurance not written in the policy, or waiver of the condition requiring such consent to be written.

The defendant's counsel asked the court to direct a verdict for the defendant, on the ground that there was no evidence of consent to the $5,500 additional insurance.

The court denied the request to direct the jury to find a verdict for the defendant, and the counsel for the defendant excepted.

The court then charged the jury as follows :

The policy on which this action is brought bears date the 31st day of March, 1864. It was issued on that day to D. Straus & Co., and in-
45 sured them on their goods to the amount of $2,000, for one year from date. The policy was assigned by Straus & Co. to this plaintiff on the 26th of Dec., 1865. Straus & Co. at that time sold the goods to the plaintiff. The policy was renewed to Straus & Co. on the 31st day of March, 1865, for one year. It was again renewed to the plaintiff after it was assigned to him, which renewal was dated the 31st day of March, 1866, for one year. Within that year—in January following, the goods were destroyed by fire. The plaintiff testifies that the goods were then worth over $9,000. At the time this policy was issued by the agent of the defendant to Straus & Co., there were policies on the goods, issued by other companies, amounting to $5,500, and those policies were renewed from time to time, till sometime in the summer of 1866—sometime about the first of August, I think—and these had been assigned to the plaintiff. Then the plaintiff surrendered those three old policies and took three other new policies amounting to $5,500, which policies were in force upon these goods at the time they were burned.

There is a consent in the body of the policy, in suit, that the insured might have other insurance upon the goods to the amount of $2,000. There is no other consent in, or on, this policy, as to other insurance, and so far as the policy itself is concerned, the persons who were insured (Straus & Co. and this plaintiff) were limited in their right to obtain other insurance on the goods to the amount of $2,000. There is this clause in the body of this policy: "If the insured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, then this policy shall be void."

Gentlemen, the taking of the additional amount of insurance upon this property, exceeding $2,000, rendered this policy void unless certain facts have been shown, which constitute a waiver of this clause in the policy, or estop the defendants from setting up the fact that there was a greater amount of other insurance on this property than $2,000.

The question in this case is whether such facts have been proved by the plaintiff, as to constitute a waiver of this clause in the
46 policy which I have read to you, and which will estop the defendant from setting up that there was a greater amount of insurance in other companies then the sum of $2,000. It is claimed by the plaintiff that when he purchased the goods of Straus & Co., that he and Straus went to the agent of the defendants, M'r Scott, who resided here, and exhibited to him all four of the policies then in existence on the goods, and that Scott then looked at the policies, so he knew that there was an amount of insurance upon the goods, aside from the amount of the policy in question, exceeding $2,000, and to the amount of $5,500, and that with this knowledge, M'r Scott consented to the assignment of the policy to the plaintiff. And that afterwards he renewed this policy, having full knowledge of the existence of these three other policies, amounting to $5,500, upon the goods mentioned in the policy in question. And that afterwards, in the summer of 1866, when the plaintiff surrendered the three old policies and took the three new policies, that the plaintiff took the new policies to M'r Scott, and M'r Scott saw them and looked at them, and said it was all right, giving the plaintiff to understand that he took the three new policies—in place of the three old ones which had been surrendered—for the sum of $5,500, on these same goods.

This is denied, and the question for you to determine is whether such a transaction occurred as is claimed on the part of the plaintiff. If everything occurred as claimed by the plaintiff, except the last transaction, the plaintiff cannot recover. But if this last transaction occurred as claimed by the plaintiff, that is, that the three new policies were taken to Scott, and Scott examined them, so that he knew there was an amount of insurance equal to $5,500 upon these goods, and that Scott then, with full knowledge of the facts, informed the plaintiff it was all right, and gave him to understand that the policy in question was not affected by the taking of the new policies, or would not be affected by taking the new policies, in my judgment, gentlemen, the defendant thereby waived the defence set up here, and the defend-
47 ant is estopped from setting up and claiming that there was an amount of other insurance upon these goods, which was not consented to in or upon the policy in question. If such a transaction actually occurred, the plaintiff is entitled to recover here the amount of the policy with interest on that sum.

Gentlemen, you have listened to the testimony of M'r Straus, and the testimony of the plaintiff. Straus was not present at the time of the last transaction, upon which this whole case turns. The plaintiff alone was there with M'r Scott. The plaintiff swears such a transaction occurred. Scott swears he recollects no such thing; he swears he never knew or consented to an insurance in other companies to the amount of $5,500 on these same goods. If Scott's evidence is right, you must render a verdict for the defendant. If Scott is mistaken and the plaintiff is right, the plaintiff is entitled to a verdict in this case. The plaintiff testifies affirmatively in the case, Scott negatively. If both these witnesses are honest and have testified, so far as they have testified, intending to tell the truth, it will be for you to say which has been mistaken or does not recollect accurately. If you cannot reconcile the evidence in that way, then you must decide which one has intentionally testified falsely. In deciding this question it is your duty to take into consideration the plaintiff's interest in this case—his interest in the recovery. And that Scott has, so far as it appears in the case, no pecuniary interest in the case. Yet you have the right to believe an interested witness as against a disinterested witness. You must look at what is probable in the case, whether the transactions as related by the plaintiff appears to you to have probably occurred in the natural course of business. Or again, on the other hand, whether it is at all probable that M'r Scott would, under the circumstances, have allowed this policy to run, knowing there was $5,500 of other insurance in other companies, upon this same property.

Gentlemen, decide this case as you believe the truth is. If you
48 think the truth in this case is with the plaintiff, find a verdict for the plaintiff for the amount due on this policy. If, on the contrary, you are of the opinion that the truth is with the defendant, render a verdict for the defendant of no cause of action.

Defendant's counsel requested the court to charge that unless the defendant consented to other insurance, over and above the $2,000, that the plaintiff cannot recover.

The COURT. I so charge.

Also, that unless the jury find that the defendant had no notice of, and consented to the three policies on these goods at the time of the fire, the plaintiff cannot recover.

The COURT. I so charge.

The defendant's counsel excepted to that portion of the charge in

which the court directed the jury, that if the three new policies were taken to Scott, and Scott examined them, so that he knew there was an amount of insurance equal to $5,500 on these goods, and Scott, with full knowledge of the facts, informed the plaintiff it was all right, and gave him to understand that the policy in question was not affected by the taking of these new policies, or would not be affected by taking the new policies, the defendant waived the defence set up, and the defendant was estopped from setting up and claiming that there was an amount of other insurance upon these goods which was not consented to in or upon the policy in question, and that if such a transaction actually occurred the plaintiff was entitled to recover the amount of his policy with interest.

The COURT. If Scott saw the policies and knew the meaning of them, and said it was all right, the plaintiff can recover.

To this ruling and direction the counsel for the defendant excepted.

The jury rendered a verdict for the plaintiff for the amount of $2,677.44.

The court directed a stay of proceedings for the defendant to move for a new trial at the general term in the first instance.

49 "A."

To the Phœnix Fire-Insurance Company of Hartford:

By your policy of insurance, issued to me at your agency at Elmira, and continued by renewal, No. 1853, to the 31st day of March, 1867. No. 1517, dated March 31, 1864, as more fully appears by the printed portions and conditions of said policy, the written portions being as follows:

On their ready-made clothing, cloths, tailors' trimmings, and such articles as are usually kept for sale in clothing stores, contained in three-story brick building, with metal roof, situated in a row of similar buildings, and known as No. 157, on the south side of Water street, in Elmira, N. Y. Other insurance, $2,000.

Consent is hereby given to remove property insured under policy No. 1517, in brick store, with metal roof, situated on the south side of and known as No. 127 Water street, in Elmira, N. Y.

The property hereby insured having been purchased by I. Pechner, The Phœnix Insurance Company consent that the interest of D. Strauss & Co. in the within policy made, be assigned to said purchaser, subject nevertheless to all the terms and conditions therein mentioned and referred to.

Dated Elmira, Dec. 26, 1865.

PERRY & SCOTT, *Agents.*

For value received, we hereby transfer, assign, and set over unto I. Pechner and his assigns, all the right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

Witness my hand and seal, this 24th day of December, 1865.

Also, there was three other insurance' on said property, to the amount of $5,500, and no more, as follows: copies of which policies and endorsements are hereunto annexed.

Insurance Company of North America, Philadelphia, $2,000, on his ready-made clothing, cloths, and trimmings, contained in the
50 first story of a three-story, tin roof, brick building, on the south side of Water street, Elmira, N. Y., as per survey, No. 265. Dated Sept. 17, 1867. One year.

Arctic Insurance Company of New York, $1,500, on his stock of ready-made clothing, cloths, and trimmings, contained in the first story of a three-story, tin roof, brick building, on the south side of Water street, Elmira, N. Y. $5,500 other insurance permitted on the same, as per survey, No. 604. Dated Aug. 29, 1866.

National Insurance Company of Boston, $2,000, on his ready-made clothing, cloths, and trimmings, contained in the first story of a three-story, tin roof, brick building, on the south side of Water street, Elmira, N. Y., as per survey.

On the 16th day of January, A. D. 1867, at about the hour of one o'clock a. m., the property insured by said policy was destroyed and damaged by fire to the amount of nine thousand nine hundred and one and $\frac{50}{100}$ dollars, hereinafter set forth.

The total cash value of all the property insured under the aforesaid policies at the time of the loss was ninety-five hundred dollars, to wit:

Ready-made clothing, cloths, and tailors' trimmings..... $9,500

And my claim on said Phœnix Fire-Insurance Company, by their said policy No. 1517, amounts to the sum of two thousand dollars, and claimed as the sole owner of the property damaged or destroyed.

The occupations and occupants of the premises, in its several parts, being as follows:

First story, I. Pechner, clothing store. Second and third stories, office and dwelling, and for no other purpose whatever.

Origin of the fire was in said building No. 127, but by what cause originated is unknown to the deponent.

There was no change in the occupancy of the premises since the insurance was effected.

The foregoing statements are just and true, and no articles specified therein but such as belong to, and were, at the time of the fire, the property of the undersigned, and no other person or party had any interest therein except as herein set forth.

51

I. PECHNER.

Personally appeared I. Pechner, signer of the foregoing statement of loss, and made solemn oath to the truth of the same before me, this 28th day of January, A. D. 1867.

GEO. L. DAVIS,
Justice of the Peace.

[5 cent revenue stamp cancelled.]

STATE OF NEW YORK,
County of Chemung:

I, Geo. L. Davis, a justice of the peace in and for said county, residing most contiguous to the property of I. Pechner, insured as set forth in the preceding affidavit, certify that I am not concerned in said loss or interested in said claim, either as a creditor or otherwise, or related to the insured or sufferers, and that I am acquainted with the character and circumstances of I. Pechner, and having made diligent inquiry into the facts set forth in the following statement, believe and know that he has really, by misfortune, without fraud or evil practice, sustained by the described fire, loss and damage to the amount of ninety-five hundred dollars, the sum stated in his affidavit of loss.

In testimony whereof, I have hereunto set my hand and official seal, this 28th day of January, A. D. 1867.

GEO. L. DAVIS,
Justice of the Peace.

[5 cent revenue stamp cancelled.]

52 At a general term of the superior court of the State of New York, held at the court-house, in the city of Binghamton, in and for the third judicial department, commencing Tuesday, Sept. 3d, 1872.

Present, Hon. Theodore Miller, presiding justice; Hon. John M. Parker, Hon. Platt Potter, justices.

ISADORE PECHNER
ag'st
THE PHŒNIX INSURANCE CO.

New trial denied, & judgment ordered for plaintiff on the verdict, with costs.

(A true copy:)

J. M. JOHNSON, *Clerk.*

(Indorsed:) Supreme court. Isadore Pechner ag'st The Phœnix Ins. Co. Copy. Order of gen'l term. S. B. Tomlinson, plff's att'y, Elmira, N. Y.

53 *Judgment September 23rd*, 1872.

Supreme court.

ISADORE PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

The case and exceptions in this action having been brought on for argument at a general term of the supreme court for the third judicial department, held at the court-house in Schenectady, and the decision of said general term therein having been made and given at a general term held at the court-house, in the city of Binghamton, on the 3rd day of September, 1872, whereby a new trial was denied and judgment ordered for the plaintiff on the verdict, with costs,

On motion of S. B. Tomlinson, of counsel for the plaintiff, it is ordered and adjudged that said plaintiff recover of said defendant
54 the amount of said verdict, being the sum of two thousand six hundred and seventy-seven $\frac{44}{100}$ dollars, with interest thereon from the 3rd of February, 1872, being $119.59, amounting in the aggregate to the sum of two thousand seven hundred and ninety-seven $\frac{03}{100}$ dollars damages, together with the sum of three hundred and eight $\frac{57}{100}$ costs and disbursements, amounting in the aggregate to the sum of three thousand one hundred and five $\frac{60}{100}$ dollars, ($3,105.60.)

(Copy:)

JOHN G. COPLEY, *Clerk.*

(Endorsed:) Filed Sept. 23d, 1872, 4 p. m.

CHEMUNG COUNTY,
Clerk's Office, ss:

I hereby certify that I have compared the foregoing copy of notice of appeal and judgment-roll with the originals thereof remaining
55 on file in this office, and that the same are true and correct transcripts thereof, and of the whole of such originals.

Witness my hand and the seal of said county at Elmira this 28th day of October, 1872.

[SEAL.]

JOHN G. COPLEY,
Clerk Chemung County.

56 Court of appeals.

(Duplicate.)

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 13th day of May, in the year of our Lord one thousand eight hundred and seventy-five, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur June 7, 1875.

57 ISIDOR PECHNER, RESPONDENT,
ag'st
THE PHŒNIX INSURANCE COMPANY, APPELLANT.

Be it remembered that on the first day of November, in the year of our Lord one thousand eight hundred and seventy-two, The Phœnix Insurance Company, the appellant in this action, came here into the court of appeals, by W. F. Cogswell, its attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York. And Isidor Pechner, the respondent in said action, afterwards appeared in said court of
58 appeals, by S. B. Tomlinson, his attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals having heard this cause argued by Mr. J. B. Perkins, of counsel for the appellant, and the same having been submitted on behalf of the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

59 Wherefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 7, 1875.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRIN, *Clerk.*

(Indorsed:) The court of appeals. Isidor Pechner, resp'd't, against The Phœnix Insurance Company, app'l't. Return on appeal. S. B. Tomlinson, resp'd't's att'y, Elmira, N. Y. W. F. Cogswell, app'l't's att'y, Rochester, N. Y. Filed Nov. 1, 1872.

60 Case 13.—Commission of appeals.

ISIDORE PECHNER, RESP'T,
v.
PHŒNIX INSURANCE COMPANY, APP'L'T.

Appeal from an order made at the general term of the supreme court, third department, denying a new trial, and ordering judgment for the plaintiff upon a verdict.

The action was brought to recover the amount of a policy of insurance for $2,000, issued to W. Straus & Co. on a stock of goods & merchandize at Elmira, & assigned by them, with the defendant's consent, to the plaintiff, who was the owner of such goods when the loss occurred.

The defendant is a corporation, created & doing business under the laws of the State of Connecticut, but having an office & transacting business at the city of Elmira, in this State.

The original complaint in the action was verified by the plaintiff May 21st, 1867, & served June 1st. The verification was made in Chemung County, & stated that the plaintiff was "of said county." An amended complaint was verified June 5th, 1869.

61 In June, 1867, the defendant filed a petition with the court praying for a removal of the cause from the supreme court to the circuit court of the United States. In this petition it was stated that the "petitioner is a citizen of the State of Connecticut, & that Pechnre, the plaintiff, is, as the petitioner is informed & believes, a citizen of the State of New York." The petition was accompanied with the usual bonds & approval.

The petition was denied, & the order affirmed at general term.

The defendant answered the amended complaint on June 21st, 1869, setting up that there was a clause in its policy providing that if the assured should have or should thereafter make any other insurance on the property thereby insured, or any part thereof, without the consent of the defendant written thereon, the policy should be void. It was then averred that, notwithstanding the said provision & in violation thereof, the insured, after the issuing of the policy, procured other insurance in designated companies to the amount of $5,500 without

62 notice to the defendant, & without its consent being written on the policy, except that by an endorsement thereon it had consented to other insurance to the amount of $2,000, & no more.

At the trial the plaintiff offered evidence under exception, which it was claimed tended to prove a waiver of the condition above set forth, concerning other insurance. The facts bearing upon this point are sufficiently stated in the opinion, as well as upon exceptions to the judge's charge to the jury.

A verdict having been rendered for the plaintiff, & the exceptions having been brought on for argument at general term, a motion for new trial was denied, and judgment ordered for the plaintiff on the verdict, with costs. The defendant thereupon appealed to this court.

James Breck Perkins for appellant.
S. B. Tomlinson for respondent.

DWIGHT, *C.*

The petition for the removal of this cause to the United States court was properly denied.

It simply alleged that when the petition was filed (June 15th,
63 1867) the defendant is a citizen of Connecticut, & the plaintiff (as the defendant is informed and believes) is a citizen of the State of New York. It is not asserted that at the time of the commencement of the action the parties were citizens of the respective States named. Such a statement is fatally defective. Holden v. Putnam Fire Ins. Co., 46 N. Y., 1. In that case the only proof of the citizenship of the plaintiff, made upon the application for removal, was found in the petition of the defendant, made & verified April 5th, 1867, & which recited that the action was commenced March 25th, 1867. After stating the nature of the action, & that the defendant is a citizen of Connecticut, it proceeded as follows: "Delos L. Holden, the plaintiff in said action, is a citizen of the State of New York." The court of appeals said that this was simply an averment that when the petition was drawn the plaintiff was a citizen of this State, but that no legal presumption arose from that fact that he was a citizen at the time of the commencement of the action. The rights of the parties under the law of
64 Congress providing for removal of causes into the Federal courts are governed by the facts existing when the action was commenced, & a subsequent change of residence or citizenship does not confer or defeat a right to proceed under it. Clark v. Mathewson, 12 Peters, 164; Mollan v. Torrance, 9 Wheat, 537. Accordingly, in the present case, as far as the statements in the petition are concerned, the court below properly denied the application for removal. People v. Chicago, 34, In., 356; Savings Bank v. Benton, 2 Metc. (K'y) 242.

The defendant, however, claims that this case is taken out of the operation of the rule in Holden v. The Putnam Fire Ins. Co. by the fact that there was in the *visification* of the plaintiff's original complaint the caption, "Chemung County," & that the plaintiff stated that he was "of said county." His argument is that the petition & complaint are to be read together, &, if so, that the words "of said county" are equivalent to an assertion of residence at the time of the com-
65 mencement of the action, & that residence is prima facie evidence of citizenship.

This argument cannot be sustained. It is not necessary to inquire whether, under the circumstances, the allegations in the petition can be connected in the way suggested, with the complaint. There was no evidence that the complaint was before the court or that it was even on file. Assuming, for the sake of the argument, that its statements & verification could be read with the petition, it cannot fairly be claimed that the words "Chemung County," T. S., Isidor Pechure, of said county, are a sufficient allegation of the citizenship of Pechure to oust the jurisdiction of the State court. It is clear beyond dispute that the State court had jurisdiction over the parties & the subject-matter until the terms of the 12th section of the United States judiciary act of 1789 were complied with. This jurisdiction is not to be subverted until clear proof is that the act of Congress has been complied with. This is all the more so since it has been determined that, if the proper
66 proof is made, the further proceedings before the State court are coram non judice, wholly without jurisdiction & void. Stevins v. Phœnix Ins. Co., 41 New York, 149.

The words on which the defendant relies are perfectly consistent with the fact that the plaintiff was, when he made his verification, a resident

alien, has since become naturalized, & at the time of filing the petition was a citizen. It is expressly held in Parker v. Overman, 18 How., U. S., 137, that an averment of residence in the petition is not enough. There must be an allegation that the party was a citizen when the action was brought. If the statement on which the defendant relies had been incorporated in the petition itself to the effect "that when the complaint was filed the plaintiff was of Chemung County, & that he is (now) a citizen of the State, &c.," it would have been plainly insufficient on the rulings in the cases of Holden v. Putnam Fire Ins. Co. & Parker v. Overman. Of course it does not improve his case that the one
67 statement was in the petition & the other in the verification of the complaint. The main question in the cause is whether the policy is void because there was other insurance upon the property without the written consent of the defendant.

The policy provided that if the insured shall have or shall hereafter make any other insurance on the property hereby insured or any part thereof without the consent of the company written herein * * then & in every such case the policy shall be void.

The appellant in regard to this clause asserts two propositions: one is that its provisions cannot be waived by mutual consent, proved by oral evidences; the other is that there was in any event no valid waiver in this case.

It appeared on the trial that the policy in question was issued at Elmira by Tho's Perry, agent for the defendant. It was in force from the 31st day of March, 1866, to the same date in 1867, & was is-
68 sued to Henry D. Straus upon a stock of goods in that city. Pechure, the plaintiff, bought the goods of Straus, who had three other policies upon them, issued by one Ayres, amounting in the aggregate to $5,500. When the sale to Pechure took place the plaintiff & Straus called at the office of Perry & stated the terms of the transaction. Scott, Perry's partner, looked at all the policies & wrote a consent to the transfer on that of the defendant, saying to the plaintiff, "You are all right; this is all you want." Afterwards, & while the policy of the defendant was in force, the plaintiff surrendered the policies issued by Ayres & took out three new policies in other companies. The amount of insurance was the same. In April the plaintiff removed to another store. He thereupon saw Scott & got his consent in writing to the removal. At the same time he exhibited to him the new policies & Scott had them in his hands & opened them. The plaintiff then asked Scott if these insurances were good & all right, & Scott having opened & looked them over said they were all right. The renewal of the
69 defendant's policy took place in March, & the facts just detailed occurred thereafter. Scott denied that he ever knew that the plaintiff had other insurance to the amount of $5,500, or that he was ever asked to consent to that amount or did consent to it. He however said that he had consented to $2,000 other insurance, & that when Straus & the plaintiff called on him to get consent to the assignment they had papers in an envelope & handed him the package, which was said to contain policies written by Ayres, & that he took out one policy & gave consent to the assignment. It was proved by Scott's testimony that he had been an agent for the defendant for about nine years, & was such at the time, & that he had been doing a large business for the company, had issued hundreds of policies & renewals, & had been notified of hundreds of cases where there was other insurance * * & that such things as consents to transfers & renewals of policies are of frequent occurrence in his business.

70 Under this testimony the judge declined to direct the jury to find a verdict for the defendant, & charged the jury that if Scott saw the policies & knew the meaning of them & said "it was all right" the plaintiff can recover. Under this instruction the jury found a verdict for the plaintiff.

The defendant, in claiming that this ruling was erroneous, insists that all this evidence was, in point of law, immaterial. It could have, in his view, no influence on the contract, since it was parol evidence, & as that cannot be resorted to for the purpose of varying a written instrument, it could not be applied to show a waiver of the condition in question.

This claim is, however, a misapplication of that rule, which is a cardinal one in construction, & simply designed to ascertain the true meaning & intent of a contract which all parties concede to be valid. It has no application when the validity of the contract itself is in question.

71 It is familiar law that a written instrument may be shown to be void by parol evidence. It may be thus attacked & overthrown for fraud, illegality, want of consideration, or other vice going to the existence of the instrument. If it can be so attacked, it can be sustained in the same manner. This doctrine applies to the case at bar. What the defendant says to the plaintiff is substantially this: "Your policy is void, because when you took out insurances with Ayres you did not observe a clause in it which requires the notice of other insurance to be endorsed in writing on the policy." "True," the plaintiff replies, "but you have by your conduct relieved me from complying with that rule, and the policy is valid." The whole contest is upon the validity or invalidity of the contract, & the sole point is, can a condition-precedent be waived by the words or acts of the parties? That is simply an inquiry whether a party can by his own acts be precluded from setting up a condition inconsistent with his acts to the injury of an opposite party, whom he has thus misled. The requirement that the consent should be endorsed on the policy is simply a provision that a prescribed act of a formal nature should be done. Suppose that the

72 policy had provided that the consent should be published in the city newspaper or pasted on a bulletin-board at a court-house door, could that be dispensed with by mutual agreement? Could not the defendant so act as to be estopped from insisting upon it? How would such a case differ in principle from that existing here? The provision that an endorsement shall be made on a policy is nothing but a direction that an act shall be done, & falls into the class of ordinary conditions-precedent.

The most that the defendant could contend for under any by policies is that the contract provides for a specific mode of proving consent, & hat this precludes all other modes, even by mutual consent. It is plain that this endorsement could not have been contemporaneous with the execution of the contract. The new policies were not taken out until after it went into operation. The defendant must then contend that if parties, when they enter into a contract not required by law to be in writing, provide for a particular mode of proving the performance of an act, they cannot by subsequent acts or arrangements vary from it.

73 The contract thus becomes an iron bond, binding both parties even against their joint will. Such a conclusion is little less than absurd. An illustration may be found in the law of grants or other dispositions of property. Suppose that a father had given an estate to his daughter to revert to himself in case she married during her minority without his written consent, & subsequently she married

with his oral consent, would that not be a substantial performance of the condition? In a case where a father, by his will, had required the consent of trustees after his death, & had subsequently given his own consent, it was held that the condition was dispensed with. There is also a class of cases in which even trustees who were required to give a consent in writing to a marriage have been held to do so by an oral consent which had been acted upon. These cases are extremely strong, as it might be plausibly claimed that they could not exceed the authority conferred by the instrument creating the trust. (Lord Strange v. Smith, Amb., 263; Worthington v. Evans, 1 Sim. & Stuart, 165; Pollock v. Croft, 1 Merio, 181; Campbell v. Netterville, 2 Ves., 534.) In Lord Strange v. Smith the consent of a mother to a marriage was re-
74 quired to be in writing, &, if there were a marriage without that consent, certain estates in land were to be forfeited by the daughter. In other words, the title was to be divested by the non-performance of a condition-subsequent. The mother proposed & encouraged the marriage. After a time she took offence & would not consent. The court held that her conduct was equivalent to a consent, & held that there was no forfeiture. This decision has been frequently approved. It is clearly sustainable on the doctrine of equitable estoppel. In Worthington v. Evans, a legacy was given on condition of the legatee marrying with the consent in writing of the executor. He afterwards married with their approbation, but they did not express their consent in the manner required by the will. It was held notwithstanding that the legatee was entitled to the legacy. The court held, inasmuch as the trustee expressed his approbation & only waited to sign the consent from a reason personal to himself, that the condition was substantially complied with. If these cases are sound, as applied to the act
75 of a trustee having specific powers conferred upon him by a conveyance or a will, how much clearer is the rule where the opposite party to a contract chooses to dispense with a condition introduced into the contract solely for his benefit, & who may have substantial reasons for waiving strict performance. I am aware that there are some cases which have held that a condition in a lease that a lessee shall not assign, &c., without the consent of the landlord in writing, is broken by such assignment, notwithstanding a subsequent parol license given by the landlord. (Roe v. Harrison, 2 Penn. R., 425.) The same rule was applied in Littles v. Hallaway, 3 id., 590, to a covenant in written articles of agreement. (See also Mosher v. Foundling Hospital, 1 V. & B., 191.) These cases, however, turn upon special doctrines applied by the court to sealed instruments. In both these cases there was a contract under seal, & the decision was rested on that ground. In the last case, the court suggested that there might be another remedy in equity. The court held in Roe v. Harrison that even the breach of such a condition may be waived by a subsequent
76 acceptance of rent by the landlord, with knowledge of the breach. In other terms, while the condition in the sealed instrument could not be dispensed with by mere words, it might be by acts inconsistent with the enforcement of the forfeiture. This doctrine was affirmed in Mosher v. The Foundling Hospital, 1 V. & B., 191, (A. D. 1813.) This was also the case of a lease under seal. There was a condition requiring the previous written consent of the landlord to the use of the premises leased for the purpose of carrying on a trade. The premises having been used for certain trades without written consent, an ejectment was brought to cause a forfeiture. A bill in equity was thereupon filed for an injunction to restrain the prosecution of the action. The

court hesitated to say that these acts would constitute a general license to carry on all sorts of trades, but that the good sense was & the law ought to be that you must infer from the lessor's conduct that he would have given that sort of license which it would have been prudent to give, & that the real question was, whether the lessee stood by &
77 permitted expenditure on the faith of the lessor's conduct, (p. 191, 192.) So, in Richardson v. Evans, 3 Maddock, 218, (A. D. 1818,) where there was a similar clause, the court said that though in a lease, with a condition requiring written consent, a parol license to underlet is not sufficient in equity any more than in law, yet if such parol license is used as a snare, & under circumstances which amount to fraud, the court will grant relief, & added "There is no proof here that the original lessee was induced by the conduct of the original lessor to underlet these premises without a written license, or that the plaintiff, relying upon this parol license, has suffered any injury or inconvenience." The court is here plainly of opinion that the doctrine of equitable estoppel may be applied to licenses of this kind.

As a result of all of the cases & of sound principle, I think it clear that a condition required by a written instrument, not under seal, that an act be performed or evidenced by a statement in writing may be waived by parol, and that from necessity, the acts going to establish waiver may be shown by parol evidence, & that while on technical
78 grounds this doctrine has not been extended in some cases in courts of law to such clauses in sealed instruments where a mere parol license has been given, yet that even in such cases a parol license may be upheld in equity on the theory of an equitable estoppel.

There's every reason why these doctrines should be applied to insurance policies. The language of the Supreme Court of the United States in Insurance Company v. Wilkinson, 13 Wallace, (U. S., 236,) leads to the same general conclusion as is maintained in the present case. "The principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it," or whose contract it may be deemed to be. It is
79 freely admitted that some of the earlier cases are opposed to these views. Thus, in Carpenter v. Washington Ins. Co., (16 Peters, 495,) it is held that the requirement of written consent cannot be waived by parol, but that there must be an endorsement on the policy. This case, however, & others resembling it, must be deemed to be overruled upon this point. See the cases collected. (May on Insurance, § 369 & § 370.)

The only further point to be considered in the case at bar is whether the facts were sufficient to justify the conclusion that a waiver had taken place.

Scott, with whom the plaintiff dealt, was by his own showing the general agent of the defendant. This is proved by the fact that he issued policies & their renewals, received in the regular course of business notice of insurance in other companies, & gave the usual consents. The power of such an agent of a stock company is plenary as to the terms & conditions of the contract, & he may make such memoranda & indorsements modifying the general provisions of the policy, & even inconsistent therewith, as in his discretion may seem

80 proper. (Gloucester Manuf. Co. v. Howard Fire-Ins. Co., 5 Gray, 498; Pitman v. Glen's Falls Ins. Co., com. appeals, Jan'y 1875. May on Ins., §129.) The same rule will be applied to consents to assignments made after the execution of the policy, provided that the agent is entrusted with that branch of business. It is clear in the outset that notice to the agent is notice to the company. Thus in Gale v. Lewis, 16 L. I. N. S., Q. B., 119, it was decided that the knowledge by an agent of the assignment of a policy prior to the declaration of the assignor's bankruptcy is the knowledge of the company in such a sense as to make the assignment complete under the English law, & prevent the policy from passing to the assignee in bankruptcy. The case was distinguished from that of Ex parte Hennessy, 2 Dror & War., 355, because in that the agent, though general, was not under the special circumstances of the case authorized to receive notice so as to affect the company. The same general rule must be applied to power to give consents to further insurance, particularly where the company knows or has rea-

81 son to know the practice of the agent, as in the present case, who testified without contradiction that he had issued hundreds of them. The general power to receive notice of further insurance, to endorse consents, & to issue policies, includes the power to waive strict compliance with the terms of the contract. In other words, what the company itself can do at its home office can in general be done by such an agent, who, in the place where the contract is made, represents the company in respect to it. Any other rule would be inconvenient & would greatly interfere with dispatch in business. A recent writer expresses the rule as now understood in these terms:

"The tendency of the court is daily becoming more decided to hold that such an agent may waive any of the conditions of the policy & bind the company by such waiver, & that his promises & acts, both of omission & commission, representations, statements, & assurances, made within the scope of his agency, & after knowledge of a breach of

82 condition, or of the inaccuracy of the statements in the application, if relied on by the insured, who is himself without fault, may be set up by the insured, either on the ground of waiver or of estoppel, in answer to a claim of forfeiture." (May on Insurance, § 143.)

The case of Insurance Company v. Wilkinson, 13 Wall., (U. S.,) 222, is highly satisfactory upon this point. In that case, the powers of general agents of life-insurance companies acting at a distance from the home office were much considered. The court said, "That the powers of the agent are prima facie co-extensive with the business entrusted to his care, & will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts & declarations of the agent within the scope of his employment, as if they proceeded from his principal." p. 235.

Had the company itself at its principal office treated the plaint-

83 iff as Scott did, assuring him that the transaction was right, I think it clear, both upon principle & authority, that it would have been estopped from setting up in its defence that the condition requiring a written endorsement on the policy had not been complied with. The plaintiff must have relied on such a statement. It is not conceivable otherwise that he would have left matters in the informal condition in which they stood when the loss occurred. Within all the authorities cited a practical fraud would be perpetuated upon him if the insurers were then allowed to repudiate the policy. The act of the gen-

eral agent must be regarded as of like character, & as being of the same effect.

This branch of the subject has been recently fully discussed in this court. See Pitney v. Glen's Falls Insurance Company, supra. It is not necessary again to go over the ground there reviewed. It
84 was there held that if at the time of issuing the policy notice of other insurance was given to the general agent of the insurers, & no objection is made, the company will be estopped from insisting on a forfeiture of the policy, because their consent was not endorsed, as literally required by the stipulation. See also Thompson v. S't Louis Mut. Life-Ins. Co., 2 Ins. L. I., 422; Peck v. New London Mut. Ins. Co., 22 Conn., 575; Van Bories v. United Life, &c., Ins. Co., 8 Bush, (K'y,) 133; May on Insurance, § 370, & cases cited.

A rule is laid down by M'r Bliss in his work on life insurance to the effect that if, at the time the acts or done or the declarations made by the company which are alleged to constitute a waiver or estoppel, the assured could not in consequence thereof by any possibility have been damaged, there is in law no waiver. (§ 267.) Conceding this to be sound law, the present case is brought within his rule. It is plain that the plaintiff might have been, & is, seriously damaged if the policy
85 is avoided by want of compliance with the condition.

The general principle applied in Pitney v. *Fal* Glen's Falls Ins. Co. must govern the case at bar. The only difference between the two cases is that in the former the waiver or estoppel took place when the contract was entered into, while in the present case the transaction occurred while the policy was in operation. This fact is not material. Scott testified that he had given consents in hundreds of instances. From the nature of the case many must occur after the contract went into operation. To these the rules of agency will apply in the same manner as in the other case. (Brockelbank v. Lugrue, 5 C. & P., 21; Bliss on Life-Ins., § 304.) In other words, the contract of insurance being made voidable & not void by a failure to comply with the conditions-precedent, at whatever stage of the contract such failure may occur, the doctrines of waver & estoppel will be applicable, unless there is
86 something special in the circumstances to prevent this application.

There was no error in the disposition of the cause in the court below, & the judgment should be affirmed.

"All concur."

(A copy.)

H. E. SICKELS,
Reporter, per M.

(Indorsed:) Commission of appeals. Isidore Pechner v. Phœnix Ins. Co. Jan'y term, 1875. Opinion. Dwight, C. $6.50.

(Indorsed:) United States Supreme Court. The Phœnix Insurance Company, pl'ff in error, vs. Isidore Pechner, def't in error. Record. W. F. Cogswell, att'y for pl'ff in error, Rochester, N. Y.

(Indorsement on cover:) No. 84. The Phœnix Insurance Company, plaintiff in error, v. Isidor Pechner. New York c't of appeals. Filed 2nd July, 1875.

Supreme Court of the U. S.

THE PHŒNIX INSURANCE COMPANY,
Plaintiff in error,

vs.

ISIDOR PECHNER,
Defendant in error.

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the State of New York.

The Federal question in this case arises out of the refusal of the State Court to relinquish its jurisdiction of the action after, as the plaintiff in error alleges, the proper proceedings had been taken to remove the same from the State Court.

The action was commenced by the service of a summons and complaint June 1st, 1867. At the time of appearing in the action, the defendant presented its petition, verified June 11th, 1867, page 13, folio 29, of the record, under section twelve of the judiciary act, and prayed that the action should be removed from the Supreme Court of the State to the United States Circuit Court, on the ground that the plaintiff was a citizen of the State of New York and the defendant a citizen of the State of Connecticut. This application was denied

at the Special Term. See order, page 16 of the record, margin. No affidavit or other paper was read by the defendant in error in opposition to this application. See recitals of papers used on the motion contained in the order. An appeal was then taken to the General Term, where the order was affirmed, same page. The plaintiff subsequently amended his complaint; which amended complaint was verified June 5th, 1869, page 5; which amended complaint was answered and the answer verified June 21st, 1869, page 11.

When the case was called for trial, and before a jury was empaneled therein, page 12, folio 27½, page 17, folio 35½, the counsel for the plaintiff in error presented to the trial court the papers used on such motion, or certified copies thereof from the clerk with whom they were filed, and requested the court to proceed no farther with the case. The counsel of the defendant in error, page 17, folio 35, "thereupon claimed and insisted that "the evidence before the Court was insufficient to de- "prive this Court of jurisdiction in this action, and that "the papers upon which a removal of the cause from "this Court was claimed are insufficient for that pur- "pose, and that this cause still remained in this Court."

"The Court denied such application, upon the grounds "that the papers were defective when presented, and are "defective still, and the cause still remains in this Court, "and the decision of the General Term remains in full "force and had not been reversed, and the Court was "bound by it; to which ruling and decision the counsel "for the defendant excepted."

The trial thereupon proceeded, and resulted in a verdict in favor of the defendant in error. A motion for a new trial was denied by the General Term, and judgment ordered for the defendant in error on the verdict, which judgment was entered, page 27; from which the plaintiff in error appealed to the Court of Appeals, page 4, folio 12. This appeal brought under

review the order of the Special Term upon the application to remove the cause from the State Court, and the order of the General Term affirming its decision, according to section eleven of the Code of Procedure then in force in the State of New York, which is as follows:

"The Court of Appeals shall have exclusive jurisdic-
"tion to review upon appeal every actual determination
"hereafter made at a General Term by the Supreme
"Court, or by the Superior Court of the city of New
"York, or the Court of Common Pleas for the city and
"county of New York, or the Superior Court of the
"city of Buffalo, in the following cases and no other:

"1.—In a judgment in an action commenced therein
"or brought there from another court; *and upon the*
"*appeal from such judgment to review any intermediate*
"*order involving the merits and necessarily affecting the*
"*judgment.*"

The case was heard by the Commission of Appeal at the January term, 1875, and decided at the May term of the same year. It will be found reported in the 65th N. Y., page 195.

The plaintiff in error relies, as errors committed in this case, upon the refusal of the Special Term to remove the case to the United States Court upon its application; of the trial Court to cease further proceedings therein, after such application was brought to its notice; and of the affirmance of the judgment by the Court of Appeals, notwithstanding the commission of such errors by the inferior courts was shown by the record before it.

FIRST.

The plaintiff in error having taken the necessary steps to remove the action from the State to the

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FIRST.

The plaintiff in error having taken the necessary steps to remove the action from the State to the

Federal Court, and the former having refused its application in that behalf, the judgment subsequently rendered in the action is reviewable in this Court, although it subsequently defended the action on the merits.

Gordon vs. Longest, 16 *Peters*, 97.
Kanouse vs. Martin, 15 *How.*, 198.

SECOND.

The plaintiff in error having complied with the conditions of the Act of Congress, the Supreme Court of New York was ousted of its jurisdiction, and all further proceedings therein were void.

1 *Statutes at Large, p.* 79, *Sec.* 12.
Cases cited under first point.
Stevens vs. Phœnix Ins. Co., 41 *N. Y.*, 149.

THIRD.

Nor can the decision of the Court of Appeals be sustained by the verbal criticism of the petition upon which the same was put in that Court.

> The petition was verified on the 11th day of June, 1867, and states that the summons was served first of June, 1867, which summons will be found at page 9. The petition also states that the petitioner "is a corporation created under and by virtue of the laws of State of Connecticut, located, doing business and having its principal office and place of business at the city of Hartford, in the State of Connecticut, and that your petitioner is

a citizen of the State of Connecticut and not a citizen of the State of New York," and that Isidor Pechner, the plaintiff, is a citizen of the State of New York.

Upon this petition, duly verified, with the proper bond, &c., the petitioner made its application for the removal of the cause.

The application was resisted by the plaintiff without producing affidavits or other proof in contradiction to the averments of the petition.

The motion was denied in the Supreme Court at a time when, according to the decisions of that Court, insurance companies foreign to the State of New York, by doing business in that state waived their right of removal of actions against them brought in the state to the Federal Courts.

Stevens against the Phœnix Insurance Company, 24th Howard Practice, 517, was decided in 1863, and was claimed to have settled the law as above stated until reversed in the Court of Appeals in September, 1869.

The case now before the Court was decided upon the strength of the case of *Holden against the Putnam Insurance Co., 46th New York*, 1, upon the ground that the petition was in the present tense and not in the past. That it did not aver that the plaintiff was a citizen on the 1st of June, 1867—the time of the commencement of the action. That case was brought to this Court by writ of error, where it was heard March 23rd, 1873, and the judgment affirmed by an equal division of the members of the Court, Chief Justice Chase having been absent at the time the case was heard. The petitions in the two cases are in nearly all respects precisely alike, and in respect to the part thereof criticised identical.

a. The right to removal depends upon the fact that the action is brought "by a citizen of the state against a citizen of another state."

It is not necessary that the fact of citizenship of the respective parties or either of them, to entitle the defendant to a removal of the cause, should be averred in the petition. It is enough that the fact appears by proof or admission, at the time of the application.

Ladd vs. Tudor, 3 *Woodbury and Winch.*, 325.
People ag'st the City of Chicago, 34 *Ill.*, 356.
Sweeney vs. Coffin, 1 *Dillon*, 73.

b. The allegation of the petition is to be deemed as speaking of the time of the commencement of the action. It was made before the return day of the summons, and following the language of the Act of Congress, avers that the plaintiff *is* a citizen of the State of New York, and the defendant *is* a citizen of the State of Connecticut. If the plaintiff seeks to defeat the application upon the ground that he was not a citizen of New York eleven days before, when the summons was served, he should be put to aver that fact.

Shepard vs. Graves, 14 *How.*, 505, 510, *and cases cited.*

c. The fact of citizenship, necessary to give the defendant the right to remove the cause, may be made to appear at the time of the application, in any proper way. The course of the plaintiff in resisting such application is an admission that the fact of citizenship sufficient to authorize the removal of the cause existed. There was no claim that the plaintiff was not a citizen of the State of New York at the time of the commencement of the action, but the application was resisted upon entirely different grounds, and grounds admitting,

by necessary implication, that the plaintiff was a citizen of the State of New York at the time he brought his suit.

d. The presumption is that the plaintiff brings his action in Court of the State of which he is a citizen, and where the petition is for the removal of the cause, on the ground that the defendant is a citizen of another state, if the plaintiff claims to retain the jurisdiction of the State Court, upon the ground that he is a citizen of another state than that in which he has brought his suit, he should be required to allege such fact and establish it. Judge Dillon, in his pamphlet on removal of causes from State to Federal Courts, p. 63, disapproves of the decision of this case in the Court below, and other similar decisions.

FOURTH.

The petition following the language of the Act of Congress is sufficient, and this is shown especially by the uniform practice in the Federal Court, under the next preceding section of the same statute.

It is provided by the eleventh section of the Judiciary Act (1 *Stat. at Large, p.* 78), that "the Circuit Court shall have original recognizance * * * of all suits of a civil nature, at common law * * * where the suit is between a citizen of the state where the suit is brought and a citizen of another state." Under this statute it has ever been held that the fact of citizenship at the time of the commencement of the action must exist, and that the fact of citizenship, to give the Court jurisdiction, must be averred.

Bingham vs. Cabot, 3 *Dallas*, 382.
Abercrombie vs. Dupris, 1 *Cranch*, 343.
Piquignot vs. Penn. R. R. Co., 16 *How.*, 104.

Although, in nearly all the states of the Union, for many years the only method by which a suit could be commenced was by some process the service and return of which preceded the filing of the declaration, the language of the declaration has been uniformly in the present tense.

I have examined many cases and have invariably found it in that form, where the declaration has been given or stated. I would refer to *Mollan vs. Torrence*, 9 *Wheaton*, 537; *Lafayette Ins. Co. vs. French*, 18 *How.*, 404; *Marshall vs. Balt. & Ohio R. R. Co.*, 16 *How.*, 314; as examples.

W. F. COGSWELL,
Of Counsel for Pl'ff in Error,
Rochester, N. Y.

Supreme Court of the United States.

DECEMBER TERM, 1877.

No. 84.

THE PHŒNIX INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ISIDOR PECHNER, DEFENDANT IN ERROR.

Error to the Court of Appeals of the State of New York.

BRIEF OF DEFENDANT IN ERROR.

J. HUBLEY ASHTON,
NATH'L WILSON,
Of Counsel.

Judd & Detweiler, Printers

Supreme Court of the United States.

DECEMBER TERM, 1877.

No. 84.

THE PHŒNIX INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ISIDOR PECHNER, DEFENDANT IN ERROR.

Error to the Court of Appeals of the State of New York.

BRIEF OF DEFENDANT IN BRROR.

STATEMENT.

This is a writ of error to the court of appeals of the State of New York. The action was brought in the supreme court of New York, in Chemung county, by the defendant in error, to recover the amount of a policy of insurance.

The summons and original complaint were served on the first of June, 1867.

On the 15th of June, 1867, the defendant in error, the plaintiff below, was served with the copy of a petition for the removal of the case to the circuit court of the United States for the northern district of New York, and a notice of a motion to be made at the next special term of the court to be held in July, for an order removing the action. (Rec., p. 13.)

On the 19th of June, 1867, the following order was passed:

"On reading foregoing notice of motion annexed to petition, affidavit verifying the same, and annexed bond, it is ordered that the defendant have twenty days additional time in which to appear and answer in this action." (Rec., p. 13.)

On the 8th day of July, 1867, this order was passed:

"On reading and filing petition, affidavit, bond, and notice of motion, which bond is approved and accepted as to its sufficiency in matter of form and of the surety *and on offering to enter the appearance of the defendant*, and after hearing Mr. Cogswell, for the defendant, and Mr. Tomlinson, for the plaintiff, ordered that the motion that this action be removed for trial from this court to the circuit court of the United States for the northern district of New York be, and the same is hereby, denied, with ten dollars costs of opposing." (Rec., p. 16.)

On the 30th of November, 1867, this order was affirmed by the supreme court of New York at a general term, by the following order:

"Orders appealed from, affirmed with $10 costs of each order." (Record, p. 16.)

No appeal was ever taken from the order of the general term. It was never reversed or modified. (Record, p. 17.)

An amended complaint was filed on the 5th of June, 1869, and an answer on the ——— of June, 1869. (Record, pp. 5 and 11.)

More than four years after the decision by the court in general term, when the action came on for trial at a circuit of the Supreme Court, held on the 2d February, 1872, the counsel for the defendant presented to the court the same petition which had been previously presented and passed upon by the court in general term in November, 1867, and requested the court to proceed no further in the case. (Record, p. 12.)

The court denied the application, "upon the grounds

that the papers were defective when presented, and are defective still, and the cause still remains in this Court, *and the decision of the general term remains in full force, and had not yet been reversed, and the court was bound by it.* (Record, p. 17.)

A jury was thereupon called, and after evidence was presented on behalf of the plaintiff and the defendant, a verdict was rendered for the plaintiff. (Record, p. 25.)

A motion for a new trial was made at a general term, and on the 3d of September, 1872, this order was passed:

"New trial denied and judgment ordered for plaintiff on the verdict, with costs." (Record, p. 27.)

The judgment entered on this order the 23d of September, 1872, was as follows:

SUPREME COURT.

ISADORE PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

"The case and exceptions in this action having been brought on for argument at a general term of the supreme court for the third judicial department, held at the court-house in Schenectady, and the decision of said general term therein having been made and given at a general term held at the court-house, in the city of Binghamton, on the 3d day of September, 1872, whereby a new trial was denied and judgment ordered for the plaintiff on the verdict, with costs.

"On motion of S. B. Tomlinson, of counsel for the plaintiff, it is ordered and adjudged that said plaintiff recover of said defendant the amount of said verdict, being the sum of two thousand six hundred and seventy-seven $\frac{44}{100}$ dollars, with interest thereon from the 3d of February, 1872, being $119.59, amounting in the aggregate to the sum of two thousand seven hundred and ninety-seven $\frac{03}{100}$ dollars damages, together with the sum of three hundred and eight $\frac{57}{100}$ costs and disbursements, amounting in the aggregate to the sum of three thousand one hundred and five $\frac{60}{100}$ dollars, ($3,105.60.)

"(Copy:)

"JOHN G. COPLEY, *Clerk.*

"(Endorsed:) Filed September 23d, 1872, 4 p. m.' (Record, p. 27.)

From this judgment, but not from the order passed at the general term, on November 30, 1867, the defendant appealed to the court of appeals. (Record, p. 4.)

The judgment of the court of appeals thereon, was as follows:

"Whereupon the said court of appeals having heard this cause argued by Mr. J. B. Perkins, of counsel for the appellant, and the same having been submitted on behalf of the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court, appealed from in this action, be in all things affirmed." (Record, p. 28.)

The writ of error is to this judgment.

POINTS OF ARGUMENT.

I.

The record does not show expressly or by necessary intendment that a question upon the construction of an act of Congress was necessarily involved in the decision of the State court, and that the State court could not have denied the right claimed without deciding such question.

I. The record shows that the court of appeals affirmed the judgment of the Supreme Court at general term; that the Supreme Court at general term affirmed the order of the circuit court, denying the defendant's motion for a new trial, and directing a judgment to be entered on the verdict of the jury; that when the case was called for trial the defendant applied for its removal to the circuit court. That the application was denied; and that at the time of the denial there was existing and in force an order of the general term denying the same application.

II. The right claimed by the defendant was based on the 12th section of the Judiciary Act, which provides—

"That if a suit be commenced in any State court against a citizen of another State, and the matter in dispute exceeds the sum or value of $500, exclusive of costs, *to be made to appear to the satisfaction of the court*, and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in said court, on the first day of its next session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the State court to accept the surety, and proceed no further in the cause."

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Under this section, the alienage of the defendant or the citizenship of the plaintiff and defendant, and the amount in controversy, must be made to appear to the satisfaction of the court.

III. It is plain, therefore, that there were before the court, when considering the defendant's petition, questions of fact determinable upon the evidence adduced, and questions of law arising from the statutes of New York and the practice of its courts, as well as a question concerning the construction of a statute of the United States.

IV. It does not appear from the judgment of the court of appeals, or from the order of the Supreme Court denying the motion, on what ground of law or fact the application was denied by the court below.

If we were at liberty to refer to the reasons given by the court for its refusal to grant the application made at the trial of the case, we would find it distinctly stated by the court as one of the grounds of its action that the court considered itself bound by the previous decision of the

general term on the same application which still remained in full force. (Record, p. 17.)

V. The case is therefore within the rule that where the ground, independent of any Federal law, on which the judgment might have been based, is of itself sufficient to sustain the decision of the State court. This court will not take jurisdiction, although it appear that the decision might have passed upon some question of Federal cognizance.

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First. The decision of the Court of Appeals affirming the judgment of the inferior courts, refusing the application for the removal of the case to the United States court, rests upon the proposition that the rights of parties under the

provisions of the act of Congress of 1789, (1 U. S. Stat. at Large 79, sec. 12; Rev. Stats., sec. 639, sub. div. 1.) providing for the removal of causes from a State court into the circuit court of the United States *are governed by the facts existing at the time the action was commenced.*

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Dwight, J., delivering the opinion of the court, said:

"The petition for the removal of this cause to the United States court was properly denied.

"It simply alleged that when the petition was filed (June 15th, 1867) the defendant is a citizen of Connecticut, & the plaintiff (as the defendant is informed and believes) is a citizen of the State of New York. It is not asserted that at the time of the commencement of the action the parties were citizens of the respective States named. Such a statement is fatally defective. Holden v. Putnam Fire Ins Co., 46 N. Y., 1. In that case the only proof of the citizenship of the plaintiff, made upon the application for removal, was found in the petition of the defendant, made & verified April 5th, 1867, & which recited that the action was commenced March 25th, 1867. After stating the nature of the action, & that the defendant is a citizen of Connecticut, it proceeds as follows: "Delos L. Holden, the plaintiff in said action, is a citizen of the State of New York." The court of appeals said that this was simply an averment that when the petition was drawn the plaintiff was a citizen of this State, but that no legal presumption arose from that fact that he was a citizen at the time of the commencement of the action. The rights of the parties under the law of Congress providing for removal of causes into the Federal courts, are governed by the facts existing when the action was commenced, & a subsequent change of residence or citizenship does not confer or defeat the right to proceed under it. Clark v. Mathewson, 12 Peters, 164; Mollan v. Torrance, 9 Wheat, 537. Accordingly, in the present case, as far as the statements in the petition are concerned, the court below properly denied the application for removal. People v. Chicago, 34 In., 356; Savings Bank v. Benton. 2 Metc., (K'y,) 242.

"The defendant, however, claims that this case is taken out

of the operation of the rule in Holden *vs.* The Putnam Fire Insurance Co. by the fact that there was in the verification of the plaintiff's original complaint the caption, "Chemung County," and that the plaintiff stated that he was "of said county." His argument is that the petition and complaint are to be read together, and, if so, that the words "of said county" are equivalent to an assertion of residence at the time of the commencement of the action, and that residence is prima facie evidence of citizenship.

"This argument cannot be sustained. It is not necessary to inquire whether, under the circumstances, the allegations in the petition can be connected in the way suggested, with the complaint. There was no evidence that the complaint was before the court or that it was even on file. Assuming, for the sake of the argument, that its statements & verification could be read with the petition, it cannot fairly be claimed that the words "Chemung County," T. S., Isidor Pechure, of said county, are a sufficient allegation of the citizenship of Pechure to oust the jurisdiction of the State court. It is clear beyond dispute that the State court had jurisdiction over the parties & the subject-matter until the terms of the 12th section of the United States judiciary act of 1789 were complied with. This jurisdiction is not to be subverted until clear proof is that the act of Congress has been complied with. This is all the more so since it has been determined that, if the proper proof is made, the further proceedings before the State court are coram non judice, wholly without jurisdiction & void. Stevins v. Phœnix Ins. Co., 41 New York, 149.

"The words on which the defendant relies are perfectly consistent with the fact that the plaintiff was, when he made his verification, a resident alien, has since become naturalized, & at the time of filing the petition was a citizen. It is expressly held in Parker v. Overman, 18 How., U. S., 137, that an averment of residence in the petition is not enough. There must be an allegation that the party was a citizen when the action was brought. If the statement on which the defendant relies had been incorporated in the petition itself to the effect 'that when the complaint was filed the plaintiff was of Chemung County, & that he is (now) a citizen of the State, &c.,' it would have been plainly insufficient on the rulings in the cases of Holden v. Putnam Fire Ins. Co. & Parker v. Overman. Of course it

does not improve his case that the one statement was in the petition & the other in the verification of the complaint."

Second. The same construction was given to the 12th section by the same court in the case of Holden *vs.* Putnam Fire Insurance Company, (46 N. Y., 5,) which was before this Court at the December term, 1872, No. 186, and was affirmed by a divided court.

Third. When the case just referred to was before this Court the attention of the Court was called to the following cases, to show that the same construction had been given to the act by the supreme court of Illinois, the supreme court of Kentucky, and by Judge Blatchford :

The People *ex rel.*
Western Trans. Co. *vs.* Superior Court, 34 Ills., 356.
Savings Bank *vs.* Benton, 2 Metc., 241.
Roberts *vs.* Nelson, 8 Blatchford, 77.

Since that time the same question has been before the supreme court of Illinois in the case of the Indianapolis, &c., *vs.* Western Railway Co., (Indiana Reports, vol. 50, p. 60,) decided in 1875.

Biddle, J., delivering the opinion of the court, says:

"The question under consideration, then, turns upon the sufficiency or insufficiency of the petition filed by the appellant to remove the cause from the supreme court of the State of New York to the circuit court of the United States. It has been held, we believe, uniformly under the 12th section of the act of Congress of 1789, that if the application to remove a cause from a State to a United States court be made by petition *it must show that the plaintiff was a citizen of the State in which the suit is brought, and the defendant a citizen of another State at the time the suit was commenced.*"

Fourth. No adjudicated case is cited in the brief of the plaintiff in error in which a different construction has been

given of the section now under consideration. It is believed that no such case can be found.

Fifth. The construction now contended for is consistent with the decisions of this Court, under the 12th section and also under the 11th section of the act of 1789.

In the case of Mollan *vs.* Torrance, (9 Wheaton, 537,) the defendant filed a plea to the jurisdiction of the court in an action wherein jurisdiction was claimed under the 11th section. Judge Marshall, in delivering the opinion of the Court, says:

"The plaintiffs contend that the plea is defective because it avers that the said H. J. Lowrie and the defendant are both citizens of the State of Mississippi at the time the plea was pleaded, not that they were citizens of said State at the time the action was brought.

"It is quite clear that the jurisdiction of the Court depends on the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events."

See also Morgan *vs.* Morgan, 12 W., 290.
Clarke *vs.* Mathewson, 12 P., 165.
Gordon *vs.* Longest, 16 P., 97.
Kanouse *vs.* Martin, 15 H., 198.
West *vs.* Aurora City, 6 Wall., 139.

Sixth. To weaken or destroy the authority of these precedents, reference is made in the brief of the plaintiff to the views of Judge Dillon, expressed in his article on the removal of causes from the State to Federal courts, contributed to the Southern Law Review, vol. 2, N. S., p. 281.

Judge Dillon says, p. 313:

"It has been decided by some of the State courts that the petition for the removal must expressly state that the parties were citizens of the respective States *at the time the suit was commenced*, and that it is not sufficient to state it in the present term or as of the time when the petition for removal was made or filed. This view is open to great doubt. It overlooks the purpose of the Constitution, and of Con-

gress in providing for removals, which was to give a resort to the non-resident party to a tribunal in which the citizen of the State should have no advantage over him. It is inconsistent with several adjudications under later acts."

The cases referred to are Johnson *vs.* Monell, 1 Wool., 390, decided by Mr. Justice Miller, at circuit, and McGinnity *vs.* White, 3 Dillon, 350, decided by Judge Dillon himself.

The case first mentioned arose under the act of March 2, 1867. (14 U. S. Stats. at Large, p. 558.)

The other under the act of July 27, 1866. (14 U. S. Stats. at Large, p. 306.)

The construction given to these acts is not necessarily inconsistent with what is here contended for as the proper construction of the 12th section of the act of 1789.

A different view has, however, been held by the supreme court of Indiana. In the case already mentioned, The Indianapolis, &c., R. W. Co., *vs.* Risley, 50 Ind., p. 60, the court say:

"We do not perceive any difference in this respect between the act of 1789 and the act of 1867, with the amendatory act of 1867, which governs the present case. The late act should, therefore, have no different construction placed upon it upon this point from that which has so long been settled as the true construction of the act of 1789. * * * Indeed, the construction that the requisite citizenship should refer to the time of the commencement of a suit is obvious. * * * It has often been decided that when jurisdiction once attaches in a court of the United States in an action between a resident citizen and a citizen of another State, it cannot be ousted by a change of residence of the parties though their position after the change may be such as would not have given jurisdiction at the time the suit was commenced. So we think that when an action has been commenced in a State court, no state of facts can afterwards be prepared to oust it of its jurisdiction and remove it to a court of the United States."

Seventh. The question of the citizenship of the plaintiff was one of fact and evidence.

It is said in Known *vs.* Martin "that a party claiming a right under an act of Congress must avail himself of some legal means to place on the record that claim, and the *facts on which it rests.*" See also RIilway Co. *vs.* Ramsey, 22 Wall., 322.

The sufficiency of the evidence to prove that the plaintiff had the requisite citizenship at the time the suit was instituted, to the satisfaction of the State court, was a matter to be determined by that court when the petition for removal was presented.

It will be seen that there was no proof and not even an allegation of the requisite citizenship.

In the averment in the petition is "that, as your petitioner is informed and believes, Isidor Pechner, the plaintiff in said action, is a citizen of the State of New York."

The verification of the petition is that, as to those matters stated upon information, "he believes it to be true." (Record, p. 14.)

In Holden *vs.* Phœnix Insurance Company, the petition contained a distinct and positive allegation as to the citizenship of plaintiff.

If it is necessary for the petitioner to state in direct terms the facts upon which his application is based, certainly the statement that he informs and believes the fact to exist, does not comply with the requirement.

The decision of the court of appeals does not, however, rest upon any verbal criticism, but upon the opinion that the case provided for by the statute was not made to appear.

The fact stated in the petition, even if admitted, created no legal presumption that the plaintiff was a citizen of New York at the time the action was brought.

Ninth. There is no analogy between a declaration at common law in the circuit court under the 11th section, and a petition for removal under the 12th section. The declara-

tion is an amplification or exposition of the original writ, and speaks of the time of the issuing of the writ, (Gould's Pleadings, 158,) and a plea in abatement must show affirmatively that the parties were citizens of the same State at the time the writ was issued.

Mollan *vs.* Torrance, 9 Wh., 537.

IV.

If the writ of error is not dismissed for want of jurisdiction, the judgment of the court of appeals should be affirmed.

J. Hubley Ashton,
Nath'l Wilson,
Of Counsel.

Ashton

Supreme Court of the United States.

DECEMBER TERM, 1877.

No. 84.

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STATEMENT.

This is a writ of error to the court of appeals of the State of New York. The action was brought in the supreme court of New York, in Chemung county, by the defendant in error, to recover the amount of a policy of insurance.

The summons and original complaint were served on the first of June, 1867.

On the 15th of June, 1867, the defendant in error, the plaintiff below, was served with the copy of a petition for the removal of the case to the circuit court of the United States for the northern district of New York, and a notice of a motion to be made at the next special term of the court to be held in July, for an order removing the action. (Rec., p. 13.)

On the 19th of June, 1867, the following order was passed:

"On reading foregoing notice of motion annexed to petition, affidavit verifying the same, and annexed bond, it is ordered that the defendant have twenty days additional time in which to appear and answer in this action." (Rec., p. 13.)

On the 8th day of July, 1867, this order was passed:

"On reading and filing petition, affidavit, bond, and notice of motion, which bond is approved and accepted as to its sufficiency in matter of form and of the surety *and on offering to enter the appearance of the defendant*, and after hearing Mr. Cogswell, for the defendant, and Mr. Tomlinson, for the plaintiff, ordered that the motion that this action be removed for trial from this court to the circuit court of the United States for the northern district of New York be, and the same is hereby, denied, with ten dollars costs of opposing." (Rec., p. 16.)

On the 30th of November, 1867, this order was affirmed by the supreme court of New York at a general term, by the following order:

"Orders appealed from, affirmed with $10 costs of each order." (Record, p. 16.)

No appeal was ever taken from the order of the general term. It was never reversed or modified. (Record, p. 17.)

An amended complaint was filed on the 5th of June, 1869, and an answer on the ——— of June, 1869. (Record, pp. 5 and 11.)

More than four years after the decision by the court in general term, when the action came on for trial at a circuit of the Supreme Court, held on the 2d February, 1872, the counsel for the defendant presented to the court the same petition which had been previously presented and passed upon by the court in general term in November, 1867, and requested the court to proceed no further in the case. (Record, p. 12.)

The court denied the application, "upon the grounds

that the papers were defective when presented, and are defective still, and the cause still remains in this Court, *and the decision of the general term remains in full force, and had not yet been reversed, and the court was bound by it.* (Record, p. 17.)

A jury was thereupon called, and after evidence was presented on behalf of the plaintiff and the defendant, a verdict was rendered for the plaintiff. (Record, p. 25.)

A motion for a new trial was made at a general term, and on the 3d of September, 1872, this order was passed:

"New trial denied and judgment ordered for plaintiff on the verdict, with costs." (Record, p. 27.)

The judgment entered on this order the 23d of September, 1872, was as follows:

SUPREME COURT.

ISADORE PECHNER
ag'st
THE PHŒNIX INSURANCE COMPANY.

"The case and exceptions in this action having been brought on for argument at a general term of the supreme court for the third judicial department, held at the court-house in Schenectady, and the decision of said general term therein having been made and given at a general term held at the court-house, in the city of Binghamton, on the 3d day of September, 1872, whereby a new trial was denied and judgment ordered for the plaintiff on the verdict, with costs.

"On motion of S. B. Tomlinson, of counsel for the plaintiff, it is ordered and adjudged that said plaintiff recover of said defendant the amount of said verdict, being the sum of two thousand six hundred and seventy-seven $\frac{44}{100}$ dollars, with interest thereon from the 3d of February, 1872, being $119.59, amounting in the aggregate to the sum of two thousand seven hundred and ninety-seven $\frac{03}{100}$ dollars damages, together with the sum of three hundred and eight $\frac{57}{100}$ costs and disbursements, amounting in the aggregate to the sum of three thousand one hundred and five $\frac{60}{100}$ dollars, ($3,105.60.)

"(Copy:)

"JOHN G. COPLEY, *Clerk.*

"(Endorsed:) Filed September 23d, 1872, 4 p. m.' (Record, p. 27.)

From this judgment, but not from the order passed at the general term, on November 30, 1867, the defendant appealed to the court of appeals. (Record, p. 4.)

The judgment of the court of appeals thereon, was as follows:

"Whereupon the said court of appeals having heard this cause argued by Mr. J. B. Perkins, of counsel for the appellant, and the same having been submitted on behalf of the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court, appealed from in this action, be in all things affirmed." (Record, p. 28.)

The writ of error is to this judgment.

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The record does not show expressly or by necessary intendment that a question upon the construction of an act of Congress was necessarily involved in the decision of the State court, and that the State court could not have denied the right claimed without deciding such question.

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"It simply alleged that when the petition was filed (June 15th, 1867) the defendant is a citizen of Connecticut, & the plaintiff (as the defendant is informed and believes) is a citizen of the State of New York. It is not asserted that at the time of the commencement of the action the parties were citizens of the respective States named. Such a statement is fatally defective. Holden v. Putnam Fire Ins Co., 46 N. Y., 1. In that case the only proof of the citizenship of the plaintiff, made upon the application for removal, was found in the petition of the defendant, made & verified April 5th, 1867, & which recited that the action was commenced March 25th, 1867. After stating the nature of the action. & that the defendant is a citizen of Connecticut. it

* Furthermore, the defendant waived his right of removal, in that he failed to file copies of the record and to enter his appearance in the Circuit Court, and failed to take any appeal from the decision of the court in general term refusing his application; but did file an answer to the complaint nearly two years later.

Ins. Co. *vs.* Morse, 20 Wall., 445.
Natl. Bank *vs.* Smith, 13 Blatch., C. C., 225.

The filing of an answer was inconsistent with his claim of right.

Kanouse *vs.* Martin, 15 H., 198.
West *vs.* Aurora City, 6 Wall., 135.
French, Trustee, *vs.* Hay, 22 Wall., 239.

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"This argument cannot be sustained. It is not necessary to inquire whether, under the circumstances, the allegations in the petition can be connected in the way suggested, with the complaint. There was no evidence that the complaint was before the court or that it was even on file. Assuming, for the sake of the argument, that its statements & verification could be read with the petition, it cannot fairly be claimed that the words "Chemung County," T. S., Isidor Pechure, of said county, are a sufficient allegation of the citizenship of Pechure to oust the jurisdiction of the State court. It is clear beyond dispute that the State court had jurisdiction over the parties & the subject-matter until the terms of the 12th section of the United States judiciary act of 1789 were complied with. This jurisdiction is not to be subverted until clear proof is that the act of Congress has been complied with. This is all the more so since it has been determined that, if the proper proof is made, the further proceedings before the State court are coram non judice, wholly without jurisdiction & void. Stevins v. Phœnix Ins. Co., 41 New York, 149.

"The words on which the defendant relies are perfectly consistent with the fact that the plaintiff was, when he made his verification, a resident alien, has since become naturalized, & at the time of filing the petition was a citizen. It is expressly held in Parker v. Overman, 18 How., U. S., 137, that an averment of residence in the petition is not enough. There must be an allegation that the party was a citizen when the action was brought. If the statement on which the defendant relies had been incorporated in the petition itself to the effect 'that when the complaint was filed the plaintiff was of Chemung County, & that he is (now) a citizen of the State, &c.,' it would have been plainly insufficient on the rulings in the cases of Holden v. Putnam Fire Ins. Co. & Parker v. Overman. Of course it

does not improve his case that the one statement was in the petition & the other in the verification of the complaint."

Second. The same construction was given to the 12th section by the same court in the case of Holden *vs.* Putnam Fire Insurance Company, (46 N. Y., 5,) which was before this Court at the December term, 1872, No. 186, and was affirmed by a divided court.

Third. When the case just referred to was before this Court the attention of the Court was called to the following cases, to show that the same construction had been given to the act by the supreme court of Illinois, the supreme court of Kentucky, and by Judge Blatchford:

The People *ex rel.*
Western Trans. Co. *vs.* Superior Court, 34 Ills., 356.
Savings Bank *vs.* Benton, 2 Metc., 241.
Roberts *vs.* Nelson, 8 Blatchford, 77.

Since that time the same question has been before the supreme court of Illinois in the case of the Indianapolis, &c., *vs.* Western Railway Co., (Indiana Reports, vol. 50, p. 60,) decided in 1875.

Biddle, J., delivering the opinion of the court, says:

"The question under consideration, then, turns upon the sufficiency or insufficiency of the petition filed by the appellant to remove the cause from the supreme court of the State of New York to the circuit court of the United States. It has been held, we believe, uniformly under the 12th section of the act of Congress of 1789, that if the application to remove a cause from a State to a United States court be made by petition *it must show that the plaintiff was a citizen of the State in which the suit is brought, and the defendant a citizen of another State at the time the suit was commenced.*"

Fourth. No adjudicated case is cited in the brief of the plaintiff in error in which a different construction has been

given of the section now under consideration. It is believed that no such case can be found.

Fifth. The construction now contended for is consistent with the decisions of this Court, under the 12th section and also under the 11th section of the act of 1789.

In the case of Mollan *vs.* Torrance, (9 Wheaton, 537,) the defendant filed a plea to the jurisdiction of the court in an action wherein jurisdiction was claimed under the 11th section. Judge Marshall, in delivering the opinion of the Court, says:

"The plaintiffs contend that the plea is defective because it avers that the said H. J. Lowrie and the defendant are both citizens of the State of Mississippi at the time the plea was pleaded, not that they were citizens of said State at the time the action was brought.

"It is quite clear that the jurisdiction of the Court depends on the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events."

See also Morgan *vs.* Morgan, 12 W., 290.
Clarke *vs.* Mathewson, 12 P., 165.
Gordon *vs.* Longest, 16 P., 97.
Kanouse *vs.* Martin, 15 H., 198.
West *vs.* Aurora City, 6 Wall., 139.

Sixth. To weaken or destroy the authority of these precedents, reference is made in the brief of the plaintiff to the views of Judge Dillon, expressed in his article on the removal of causes from the State to Federal courts, contributed to the Southern Law Review, vol. 2, N. S., p. 281.

Judge Dillon says, p. 313:

"It has been decided by some of the State courts that the petition for the removal must expressly state that the parties were citizens of the respective States *at the time the suit was commenced*, and that it is not sufficient to state it in the present term or as of the time when the petition for removal was made or filed. This view is open to great doubt. It overlooks the purpose of the Constitution, and of Con-

gress in providing for removals, which was to give a resort to the non-resident party to a tribunal in which the citizen of the State should have no advantage over him. It is inconsistent with several adjudications under later acts."

The cases referred to are Johnson *vs.* Monell, 1 Wool., 390, decided by Mr. Justice Miller, at circuit, and McGinnity *vs.* White, 3 Dillon, 350, decided by Judge Dillon himself.

The case first mentioned arose under the act of March 2, 1867. (14 U. S. Stats. at Large, p. 558.)

The other under the act of July 27, 1866. (14 U. S. Stats. at Large, p. 306.)

The construction given to these acts is not necessarily inconsistent with what is here contended for as the proper construction of the 12th section of the act of 1789.

A different view has, however, been held by the supreme court of Indiana. In the case already mentioned, The Indianapolis, &c., R. W. Co., *vs.* Risley, 50 Ind., p. 60, the court say:

"We do not perceive any difference in this respect between the act of 1789 and the act of 1867, with the amendatory act of 1867, which governs the present case. The late act should, therefore, have no different construction placed upon it upon this point from that which has so long been settled as the true construction of the act of 1789. * * * Indeed, the construction that the requisite citizenship should refer to the time of the commencement of a suit is obvious. * * * It has often been decided that when jurisdiction once attaches in a court of the United States in an action between a resident citizen and a citizen of another State, it cannot be ousted by a change of residence of the parties though their position after the change may be such as would not have given jurisdiction at the time the suit was commenced. So we think that when an action has been commenced in a State court, no state of facts can afterwards be prepared to oust it of its jurisdiction and remove it to a court of the United States."

Seventh. The question of the citizenship of the plaintiff was one of fact and evidence.

It is said in ~~Known~~ *vs.* Martin "that a party claiming a right under an act of Congress must avail himself of some legal means to place on the record that claim, and the *facts on which it rests.*" See also RIlway Co. *vs.* Ramsey, 22 Wall., 322.

The sufficiency of the evidence to prove that the plaintiff had the requisite citizenship at the time the suit was instituted, to the satisfaction of the State court, was a matter to be determined by that court when the petition for removal was presented.

It will be seen that there was no proof and not even an allegation of the requisite citizenship.

In the averment in the petition is "that, as your petitioner is informed and believes, Isidor Pechner, the plaintiff in said action, is a citizen of the State of New York."

The verification of the petition is that, as to those matters stated upon information, "he believes it to be true." (Record, p. 14.)

In Holden *vs.* Phœnix Insurance Company, the petition contained a distinct and positive allegation as to the citizenship of plaintiff.

If it is necessary for the petitioner to state in direct terms the facts upon which his application is based, certainly the statement that he informs and believes the fact to exist, does not comply with the requirement.

The decision of the court of appeals does not, however, rest upon any verbal criticism, but upon the opinion that the case provided for by the statute was not made to appear.

The fact stated in the petition, even if admitted, created no legal presumption that the plaintiff was a citizen of New York at the time the action was brought.

Ninth. There is no analogy between a declaration at common law in the circuit court under the 11th section, and a petition for removal under the 12th section. The declara-

tion is an amplification or exposition of the original writ, and speaks of the time of the issuing of the writ, (Gould's Pleadings, 158,) and a plea in abatement must show affirmatively that the parties were citizens of the same State at the time the writ was issued.

Mollan *vs.* Torrance, 9 Wh., 537.

IV.

If the writ of error is not dismissed for want of jurisdiction, the judgment of the court of appeals should be affirmed.

J. Hubley Ashton,
Nath'l Wilson,
Of Counsel.